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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 844.

METROPOLITAN WATER COMPANY, APPELLANT,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED OCTOBER 28, 1911.

(22,920.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 13, 1911.

1 In the Circuit Court of the United States for the District of Kansas, First Division.

In Equity. No. 8951.

METROPOLITAN WATER COMPANY, Complainant,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, Kansas; George Stumpf, L. J. Mason, and Al Mebus, Defendants.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Kaw Valley Drainage District of Wyandotte County, Kansas, George Stumpf, L. J. Mason, and Al Mebus, Greetings:

Whereas, Metropolitan Water Company, the above entitled complainant, has lately appealed to the Supreme Court of the United States from a decree lately rendered in the Circuit Court of the United States for the District of Kansas, First Division, made in favor of you and each of you, and has filed the security required by law; you are, therefore, hereby cited to appear before the said Supreme Court of the United States, at the City of Washington, within thirty days from the date of this writ, to do and receive what may appertain to justice to be done in the premises.

Witness the Hon. Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 9th day of October, 1911.

JOHN C. POLLOCK,
United States District Judge,
Presiding in the Circuit Court.

2 We accept service of the within writ, this 10 day of October, 1911.

L. W. KEPLINGER,
C. W. TRICKETT,
Attorneys for the Above-named Defendants.

3 [Endorsed:] In Equity No. 8951. Metropolitan Water Company Complainant vs. The Kaw Valley Drainage District of Wyandotte County Kansas et al. Defendants. Citation. Filed Oct. 9, 1911. Geo. F. Sharitt, Clerk.

4 In the Circuit Court of the United States for the District of Kansas.

METROPOLITAN WATER COMPANY, Complainant,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, Kansas; George Stumpf, L. J. Mason, and Al Mebus, Defendants.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of Kansas:

Metropolitan Water Company of West Virginia, a citizen and resident of said State presents its bill against The Kaw Valley Drainage District of Wyandotte County, Kansas, George Stumpf, L. J. Mason and Al Mebus, of said county and state.

And thereupon your orator complains and says:

1. Complainant is now and at all times hereinafter mentioned was a corporation duly created and organized under and by virtue of the laws of the State of West Virginia and a citizen and resident of said State. Defendant, The Kaw Valley Drainage District of Wyandotte County, Kansas, is now and at all the times hereinafter mentioned was a public corporation duly created and organized under and by virtue of the laws of the State of Kansas, to-wit: an act of said state of the Laws of 1905, entitled,

"An Act in relation to natural water courses providing for the protection, control, deepening, widening, removing obstructions from, changing, regulating, establishing and maintaining the channel thereof; construction, maintenance and repair of levees along the same to prevent overflow and the raising and elevation of railroad tracks and public highways that interfere with the construc-
5 tion and maintenance of such levees, the construction and regulation of drains and other works conducive to the public health, convenience and welfare in district subject to overflow and to these ends providing for and authorizing the organization of public corporations, to be known as Drainage Districts and prescribing the duties and defining the powers of such public corporations."

and was and is a citizen and resident of Wyandotte County, Kansas. Defendants George Stumpf, L. J. Mason and Al Mebus at all the times hereinafter mentioned were and now are, all and each of them, citizens and residents of Wyandotte County, Kansas.

This suit, therefore, is between citizens of different states.

The matter in dispute herein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars ($2000.00). The land owned by complainant, hereinafter described and set forth is of the value of more than one hundred thousand dollars ($100,000.00) and will be wholly taken by defendant drainage district, to the damage and injury of complainant to an amount exceeding one hundred thousand dollars ($100,000.00), if defendants are per-

mitted to proceed with the illegal and wrongful proceeding hereinafter mentioned.

Defendant The Kaw Valley Drainage District of Wyandotte County, Kansas, will hereinafter be called the Drainage District.

2. The Drainage District on January 4, 1911, presented a written application to Hon. E. L. Fischer, Judge of the District Court of Wyandotte County, Kansas, at Kansas City, Kansas, reciting among other things, that the appropriation of certain lands therein described in Wyandotte County Kansas, and within said District was necessary for the use of the Drainage District in the construction of levees and widening and deepening the channel of the Kansas River, which flows through said district, and otherwise improving said river and making other improvements necessary for the purposes provided in said act of Kansas aforesaid, and asking for the appointment of three commissioners to make an appraisement and assessment of damages as provided by law. Said lands were described in said application as follows:

6 "Beginning at a point of intersection of the United States harbor line on right bank of the Kansas River, approved June 24, 1910, with the right bank of the Missouri River at Station 11 plus 54.90 feet on said harbor line thence southwest to a point 30 feet distant from said harbor line and at right angles thereto, thence up stream and paralleling said harbor line 2472 feet, more or less, to an intersection of said paralleling line with the north wall of a brick building known as the lard house of the Fowler Packing Company; thence westerly and following the northerly wall line of said building 42 feet, more or less, to the northwesterly line of said building 23 feet, more or less, to a point 30 feet distant and at right angles to said harbor line; thence up stream and paralleling said harbor line 2843 feet, more or less, to a point 30 feet distant from and at right angles to station 65 plus 45 feet of said harbor line; thence westerly to the Kansas River, thence northerly and following the bank of the Kansas River to its curve; thence southeasterly and following the right bank of the Missouri River to the point of beginning."

Complainant now is and for a long time prior hereto was the exclusive owner of certain lands lying and being in Wyandotte County, Kansas, all contained in the lands described in said application for the appointment of commissioners, described as follows:

Beginning at a point of intersection of the United States harbor line on the right bank of the Kansas River, approved June 24, 1910, with the right bank of the Missouri River at Station 11 plus 54.90 feet on said harbor line; thence southwest to a point 30 feet distant from said harbor line, and at right angles thereto, thence up stream and paralleling said harbor line 7080 feet more or less, to a point of intersection with the Government Survey Line of 1856 for the point of beginning of complainant's land, thence continuing parallel to said harbor line and 30 feet distant therefrom 1295 feet, more or less, to an intersection with the line dividing allotments 16 and 17 as defined in partition suit 911, in the District Court of Wyandotte County, Kansas, thence south 61 degrees, 58′ west 164 feet,

more or less, to the westerly line of that part of James Street leading to the County Bridge across the Kansas River; thence north
7 56 degrees 18′ west 335 feet, more or less to the right bank of the Kansas River; thence down the Kansas River following its meanderings 1560 feet, more or less, to an intersection with the government survey line of 1856; thence southeast on said Government Survey Line to the point of beginning, all lying and being in the northeast and southeast quarters of the northeast quarter of Section 10, Township 11, South, Range 25 East in Wyandotte County, Kansas, except or subject to certain rights of way for various purposes over and across said land heretofore granted to or obtained by or through condemnation proceedings by the Kansas City Northwestern Railroad Company, Kansas City, Fort Scott & Memphis Railway Company, Union Terminal Railway Company, City Terminal Railroad Company, Edgewater Connecting Railway Company, Kansas City Viaduct & Terminal Railway Company, Kansas City, Missouri and Kansas City, Kansas.

Complainant's said land is included in and constitutes a part of the land described and set forth in said application for the appointment of commissioners.

3. Complainant, upon the 5th day of January, 1911, at Kansas City, Kansas, presented to the Honorable E. L. Fischer, Judge of the District Court of Wyandotte County, Kansas, a petition and bond for the removal of the proceeding instituted and begun by said Drainage District by the presentation of said application for the appointment of commissioners to condemn land aforesaid, to the Circuit Court of the United States for the District of Kansas, and at the same time with said petition for removal presented a bond for removal. Said petition and bond for removal were in due and proper form and the security offered in and by said bond was adequate. Such petition and bond for removal were also filed with the clerk of said Wyandotte County District Court.

Said petition for removal showed that there was a separate controversy between complainant and the Drainage District; and that the matter and amount in dispute in said condemnation proceeding exceeded, exclusive of interest and costs, the sum of two thousand dollars ($2000) and showed the existence of all jurisdictional
8 facts entitling complainant to the removal of said proceeding to the Circuit Court of the United States for the District of Kansas.

At the time of the filing of said petition and bond for removal and at the time of the presentation thereof to Judge Fischer, no appointment of commissioners had been made by him upon the application of said Drainage District.

Said petition and bond for removal were presented to Judge Fischer at the hour of 9.20 a. m. on January 5, 1911.

At 2 o'clock P. M. on said day Judge Fischer denied and overruled said petition for removal.

A copy of said petition and bond for removal and order of Judge Fischer denying the removal, all attached together, is attached hereto as Exhibit 1.

Complainant is informed and believes and alleges on information and belief that between the presentation of the petition and bond for removal, as aforesaid, and the denial thereof, Judge Fischer made an appointment in writing of commissioners upon said application of the Drainage District. Said Commissioners so appointed were defendants herein George Stumpf, L. J. Mason and Al Mebus. Said defendants will hereinafter be called the Commissioners.

4. The Commissioners all accepted their appointment and on January 6, 1911, the application of the Drainage District for the appointment of commissioners and the said appointment in writing of the commissioners were recorded in the office of the Register of Deeds of Wyandotte County, Kansas, and the Commissioners were sworn to honestly and faithfully discharge their duties as such commissioners, as required by law and the provisions of said Act of Kansas.

A copy of said application and appointment attached together is hereto attached and marked Exhibit 2.

5. The Commissioners, immediately after the filing of said application for the appointment of commissioners and the appointment of commissioners in the office of the Register of Deeds for Wyandotte County Kansas, as aforesaid, entered upon the performance of
9 their duties as commissioners, notwithstanding the action of complainant as aforesaid for the removal of said condemnation proceedings to the United States Circuit Court for the district of Kansas, and caused to be published on January 6th, 1911, a notice of condemnation of land for use by the Drainage District, wherein and whereby notice was given that the Commissioners would meet at 10 o'clock a. m. on the 19th day of January, 1911 at the east end of the James Street Bridge over the Kansas River in Kansas City, Kansas, and thereupon proceed upon actual view to condemn, for the use of the Drainage District, the tract of land described in said notice and appraise the value of the land and assess the true damages done to the owner thereof, said land described in said notice being the land described in the application for the appointment of commissioners, presented by the Drainage District aforesaid and hereinafter described.

Complainant is informed and believes and, upon information and belief, alleges that unless restrained from so doing, the Commissioners will proceed, on the day mentioned in said notice and as therein set forth, to appraise the value of said land and assess damages done to the owners thereof.

6. The complainant has caused a full, true and correct transcript of the application by the Drainage District to Judge Fischer for the appointment of commissioners as aforesaid, of his appointment in writing of the commissioners as aforesaid, of complainant's petition and bond for removal presented to Judge Fischer as aforesaid, and the order by him denying the removal as aforesaid, to be made and has filed the same with the clerk of this court at Topeka, Kansas.

7. Complainant alleges that the condemnation proceeding aforesaid was and is a suit of a civil nature in the meaning of the Acts of Congress for the removal of cases from the state courts to the Circuit Court of the United States, and that said condemnation proceeding

was legally removed at once upon the filing of said petition and bond for removal to this court and that thereafter Judge Fischer had no power to appoint commissioners in said proceeding and that the appointment thereof by him was illegal and wrongful and that
10 said commissioners so appointed have no power to act in said condemnation proceeding.

8. If said condemnation proceeding be not a civil suit within the meaning of said Acts of Congress for the removal of cases as aforesaid, then said act of the State of Kansas, under which said proceeding was instituted and had, is unconstitutional, null and void, being in violation of the 14th Amendment to the Constitution of the United States in that it deprives complainant of its land aforesaid without due process of law, in this, that the effect of said Act is that the Drainage District upon the payment by it to the Treasurer of Wyandotte County, Kansas, of the amount in full of the appraisement made by the Commissioners, within ninety days of the time a copy of such appraisement should be filed in the office of said Treasurer, would become possessed absolutely of the right to the perpetual use of complainant's land for the purposes for which it is sought to condemn the same; and complainant would be deprived of its constitutional right to have its land valued and appraised in a judicial proceeding before it should be taken.

9. Said Act of Kansas is unconstitutional and void in that it deprives complainant of its land without due process of law, in violation of the 14th Amendment to the Constitution of the United States, in this further respect, although said Act authorizes complainant to appeal to the District court of Wyandotte County, Kansas, from the award that the commissioners may make, it gives to the Drainage District the right to take possession of said land and appropriate it to the uses for which its condemnation is sought, to-wit: the construction of levees and the widening and deepening of the channel of the Kansas River, so as to make such land a part of the bed of the Kansas River and one of the banks thereof, and to make it valueless for all private purposes forever, and no provision is made by said Act to properly secure to complainant the payment of any excess that may be awarded to it on appeal over and above the amount of the appraisement made by the commissioners. The only provision made in said Act tending to secure to complainant the payment of said excess is the requirement that the Drainage District shall give a bond with sufficient surety to be approved by the County Clerk to
11 pay such excess. This is not sufficient under the 14th Amendment to the Constitution of the United States.

Inasmuch as complainant can have no adequate relief, except in this court, and to the end, therefore, that said defendants may, if they can, show why complainant should not have the relief hereby prayed for and make a full disclosure and discovery of all the matters aforesaid according to the best of their knowledge and belief, full, true, direct and perfect answers to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby waived.

Complainant prays that your honors may grant a writ of injunc-

tion issued out of and under the seal of this honorable court perpetually enjoining and restraining defendant, the Drainage District, and its attorneys from prosecuting said condemnation proceeding before defendants The Commissioners, so far as it relates to complainant's land, and enjoining and restraining defendants, The Commissioners, and each of them, from taking any further action under their appointment by Honorable E. L. Fischer, Judge of the Wyandotte County District Court, as commissioners in said condemnation proceeding, so far as relates to the land of complainant or any part of it, and from appraising the value of complainant's land and the damages that will be done by the appropriation thereof by the Drainage District, and for such other relief, as to the Court shall seem equitable and proper in the premises.

Complainant prays that a provisional or preliminary restraining order be issued to the same purport and effect as herein prayed for against the respective defendants to remain in force until the further order of the court herein or until this suit shall be finally disposed of.

May it please Your Honors to grant unto complainant, not only a writ of injunction conformable to the prayer of this bill but also a writ of subpœna issuing out of and under the seal of this court directed to The Kaw Valley Drainage District of Wyandotte County, Kansas, and George Stumpf, L. J. Mason and Al Mebus, commanding them on a day certain to appear and answer unto this bill of complaint and to abide by and perform such order and decree
12 in the premises as to the court shall seem proper and required by the principles of equity.

WILLARD P. HALL,
Attorney for Complainant.

STATE OF MISSOURI,
County of Jackson, ss:

Willard P. Hall, first being duly sworn, makes oath and says that he is the attorney of complainant, that he has authority to make this affidavit for complainant, and that the facts in the above bill are true.

WILLARD P. HALL.

Sworn and subscribed before me this 11th day of January, 1911. My commission expires May 8, 1911.

[SEAL.]

SALLIE A. CREASON,
Notary Public Within and for Jackson County, Missouri.

13 EXHIBIT 1.

In the District Court of Kansas for Wyandotte County, Kansas.

In the Matter of the Application of THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, for the Appointment of Commissioners to Condemn Land.

Petition of Metropolitan Water Company for Removal to the United States Circuit Court.

To the Honorable Judge of the above entitled court, E. L. Fischer:

Your petitioner, Metropolitan Water Company, respectfully shows that the above entitled proceeding is a suit of a civil nature and was brought by the above entitled drainage district under and in pursuance of Sec. 39 of an act of the State of Kansas entitled "An Act in relation to natural water courses, providing for the protection, control, deepening, widening, removing obstructions from, changing, regulating, establishing and maintaining the channel thereof; construction, maintenance and repair of the levees along the same to prevent overflow, and the raising and elevation of railroad tracks and public highways that interfere with the construction and maintenance of such levees; the construction and regulation of drains and other works conducive to the public health, convenience and welfare in district subject to overflow; and to these ends providing for and authorizing the organization of public corporations, to be known as Drainage Districts, and prescribing the duties and defining the powers of such public corporations" of the laws of Kansas of 1905, approved February 25th, 1905, upon the 5th day of January, 1911, for the purpose of appropriating divers and various tracts of land, being the private property of divers and different persons, individuals and corporations for use by said drainage district, and to that end to cause the value of the lands aforesaid to be ap-

14 praised and assessed in the manner provided by sections 39 to 47, both inclusive of said Act of the State of Kansas.

Your petitioner further shows that it is the sole and exclusive owner of certain tracts and parcels of said land aforesaid and that there is in said suit a proceeding and controversy wholly between your petitioner and said drainage district; that the matter and amount in dispute between your petitioner and said drainage district exceeds the sum or value of two thousand dollars ($2000.00) exclusive of interest and costs; that your petitioner was, at the time of the bringing of said suit, and still is a citizen of the State of West Virginia, being a corporation organized and existing under the laws of the State of West Virginia; and that the said drainage district is a public corporation organized and existing under the laws of the State of Kansas; that there is a controversy in said suit or proceeding wholly between citizens of different states, to-wit: your petitioner and said drainage district, which can be fully determined as between them; that said controversy is as to the value of your peti-

oner's land sought to be taken in said suit or proceeding, and that our petitioner and said drainage district are both actually and lely interested in said controversy, and that your petitioner desires remove this suit before the trial thereof into the next circuit court the United States to be held in the District of Kansas.

And your petitioner offers herewith good and sufficient surety r its entering in the Circuit Court of the United States for the Dis-ict of Kansas, on the first day of its next session, a copy of the cord in this suit, and for paying all costs that may be awarded by e said Circuit Court of the United States, if said court shall hold at this suit was wrongfully or improperly removed thereto.

And your petitioner therefore prays, that said surety and bond ay be accepted; that said suit may be removed into the next Circuit ourt of the United States, to be held in the District of Kansas, pur-ant to the statutes of the United States, in such case made and pro-ded, and that no further proceedings may be had herein in this urt.

And it will ever pray.

WILLARD P. HALL,
Attorney for Petitioner.

5 STATE OF ——,
County of ——:

Lee Riley makes oath and says that he is the agent of the above amed petitioner, Metropolitan Water Company, that he has full uthority to act for said company in this behalf, that the foregoing etition is true.

LEE RILEY.

Subscribed and sworn to before me this 5th day of Jan'y 1911.
[SEAL.] J. WILL THOMAS,
Clerk District Court.

In the matter of the application of the Kaw Valley Drainage Dis-ict of Wyandotte County, Kansas, for the Appointment of Com-issioners to Condemn Land. Petition of Metropolitan Water Com-any for Removal to the United States Circuit Court. Filed Jan. 1911. J. Will Thomas, Clerk, By C. S. Thomas, Deputy.

6 In the District Court of Kansas for Wyandotte County, Kansas.

n the Matter of the Application of THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, for the Appointment of Commissioners to Condemn Land.

Bond No. 5679.

Bond on Removal.

Know all men by these presents That we, Metropolitan Water ompany, of West Virginia, as principal, and Globe Surety Com-

pany of Kansas City, Missouri, as surety, are holden and stand firmly bound unto The Kaw Valley Drainage District of Wyandotte County, Kansas, in the penal sum of Five Hundred Dollars ($500.00) for the payment whereof, well and truly to be made unto the said The Kaw Valley Drainage District of Wyandotte County, Kansas, its successors and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and firmly by these presents.

Upon condition, nevertheless, that whereas the said Metropolitan Water Company has filed its petition in the District Court of the State of Kansas for Wyandotte County, for the removal of a certain cause therein pending, wherein said The Kaw Valley Drainage District of Wyandotte County, Kansas is plaintiff and the said Metropolitan Water Company is defendant, to the Circuit Court of the United States, within and for the District of Kansas.

Now if the said Metropolitan Water Company shall enter into said Circuit Court of the United States, on the first day of its next term, a copy of the record in said court, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in force and virtue.

In witness whereof, we the said Metropolitan Water Company and Globe Surety Company of Kansas City, Missouri, have hereunto set our hands and seals this 3rd day of January, 1911.

17 METROPOLITAN WATER CO., [SEAL.]
By LEE RILEY. [SEAL.]
GLOBE SURETY COMPANY OF KANSAS CITY, MISSOURI,
By J. W. VAN BUREN, *Vice President.*

Attest:
[SEAL.] H. P. FONES,
[SEAL.] *Assistant Secretary.*

Endorsed: In the matter of the Application of the Kaw Valley Drainage District of Wyandotte County, Kansas, for the Appointment of Commissioners to Condemn Land. Bond on Removal. Filed Jan. 5th, 1911. J. Will Thomas, Clerk. By C. S. Thomas, Deputy.

18 STATE OF MISSOURI,
County of Jackson, ss:

On the 3rd day of January in the year nineteen hundred eleven before me personally came Jas. Van Buren to me known, who being by me duly sworn did depose and say, that he resides in Kansas City, Missouri; that he is the Vice-President of the Globe Surety Company, of Kansas City, Missouri; the corporation described in, and which executed *and* annexed bond of Metropolitan Water Company of West Virginia that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed *of* the Board of Directors of said corporation, and that he signed his name thereto by like order. And the said Jas. Van

Buren further states that he is acquainted with H. P. Fones and knows him to be the Ass't Secretary of said corporation that the signature of the said H. P. Fones subscribed to said instrument is in the genuine handwriting of said H. P. Fones and was thereto affixed by order of the Board of Directors in the presence of him, the said Vice President.

[SEAL.]

JAS. VAN BUREN,
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 3rd day of January, 1911.

[SEAL.]

EDNA E. TUTT,
(Notary Public.)

My Commission expires Oct. 22, 1911.

19 In the District Court of Wyandotte County, Kansas.

In the Matter of the Application of THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, for the Appointment of Commissioners to Condemn Land.

Journal Entry.

And now on this 5th day of January, 1911 this cause comes on for hearing on the application of the Metropolitan Water Company to remove to the Federal Court the application of the Board of Directors of the Kaw Valley Drainage District for the appointment of Appraisers for the condemnation of land for the widening and improving of the Kansas River, and the undersigned, E. L. Fischer, being the duly elected, qualified and acting Judge of the District Court of Wyandotte County, Kansas, being fully advised in the premises doth overrule and deny said application.

E. L. FISCHER, *Judge.*

20 EXHIBIT 2.

In the Matter of the Application of THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, for the Appointment of Commissioners for the Condemnation of Land.

Application for the Appointment of Commissioners.

To the Honorable E. L. Fischer, Judge of the District Court of Wyandotte County, Kansas:

Your petitioner, the Kaw Valley Drainage District of Wyandotte County, Kansas, respectfully states that it is a drainage district organized under the provisions of Chapter 215 of the Laws of Kansas of 1905, and under and by virtue of the provisions of said act has the power *to* eminent domain.

And your petitioner further says that the appropriation of cer-

tain lands in Wyandotte County, Kansas, and within said district, is necessary for the use of said district in the construction of levees and widening and deepening the channel of the Kansas River, which flows through said district and otherwise improving said river and making other improvements necessary for the purposes provided in said act.

Said district has caused a survey and description of the land so required, to be made by a competent engineer and the same has been filed with the Secretary of the Drainage Board of said district and thereupon the said Board did make an order declaring it to be necessary that said lands be appropriated for such purposes.

Your petitioner further says that the tract or tracts of land so declared to be necessary for the use of said district for the purposes aforesaid are described as follows, to-wit:—

21 "Beginning at a point of intersection of the United States harbor line on right bank of the Kansas River, approved June 24, 1910, with the right bank of the Missouri River at Station 11 plus 54.90 feet on said harbor line thence southwest to a point 30 feet distant from said harbor line and at right angles thereto, thence up stream and paralleling said harbor line 2472 feet, more or less, to an intersection of said paralleling line with the north wall of a brick building known as the lard house of the Fowler Packing Company; thence westerly and following the northerly wall line of said building 42 feet, more or less, to the northwesterly line of said building 23 feet, more or less to a point 30 feet distant and at right angles to said harbor line; thence up stream and paralleling said harbor line 2843 feet, more or less, to a point 30 feet distant from and at right angles to station 65 plus 45 feet of said harbor line; thence westerly to the Kansas River, thence northerly and following the bank of the Kansas River to its curve; thence southwesterly and following the right bank of the Missouri River to the point of beginning."

Wherefore said Kaw Valley Drainage District asks for the appointment of three commissioners to make the appraisement and assessment of damages as provided by law.

KEPLINGER & TRICKETT,
Attorneys for Kaw Valley Drainage District of Wyandotte County, Kansas.

22 In the Matter of the Application of THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, for the Appointment of Commissioners for the Condemnation of Lands.

Order Appointing Commissioners.

And now on this 5th day of January, 1911, comes the Kaw Valley Drainage District of Wyandotte County, Kansas, by L. W. Keplinger, and C. W. Trickett, its attorneys, and presents its petition alleging it to be necessary to appropriate certain lands in Wyandotte county, Kansas, for the widening and deepening of the channel of

the Kansas River, and for the construction of levees along the banks of said stream and otherwise improving the same which lands are described in said petition as follows:

Beginning at point of intersection of the United States harbor line on right bank of the Kansas River, approved June 24th, 1910, with the right bank of the Missouri River, at Station 11 plus 54.90 feet on said harbor line, thence southwest to a point 30 feet distant from said harbor line and at right angles thereto; thence up stream and paralleling said harbor line 2472 feet more or less to the intersection of said parallel line with the north wall of a brick building known as the lard house of Fowler Packing Company; thence westerly and following the northerly wall line of said building 42 feet more or less to the northwesterly corner of said building; thence southerly and following the westerly line of said building 23 feet more or less to a point 30 feet distant from and at right angles to said harbor line; thence up stream and paralleling said harbor line 2843 feet more or less to a point 30 feet distant from and at right angles to station 65 plus 45 feet of said harbor line; thence westerly to the Kansas River; thence northerly and following the bank of the Kansas River to its mouth; thence southeasterly and following the right bank of the Missouri River to the point of beginning.

Which petition asks the appointment of three commissioners for the making of necessary valuation, appraisement and assessment of damages which will be necessary by reason of such appropriation, and it further appearing that said application is in due form and that all conditions necessary to authorize the allowance of the same have been complied with.

23 Now, therefore, I, E. L. Fischer, Judge of the District Court of Wyandotte County, Kansas, by virtue of the power vested in me by law, do hereby appoint George Stumpf, L. J. Mason and Al Mebus, as commissioners to appraise and value the said lands upon actual view and appraise and value each owner's interest therein and assess his damage separately and to value and appraise the value of all the improvements upon said property or any part thereof separately and assess all other damages done to the respective owners of said property by reason of said appropriation and otherwise perform the duties devolving upon said commissioners by law.

E. L. FISCHER,
Judge of the District Court.

Endorsed: #8951. Metropolitan Water Company, Complainant, vs. The Kaw Valley Drainage District of Wyandotte County, Kansas, Defendant. Bill of Complaint. Filed Jan'y 13, 1911. Geo. F. Sharitt, clerk. Willard P. Hall, Attorney for Complainant.

24 UNITED STATES OF AMERICA.
District of Kansas, ss:

The United States of America to The Kaw Valley Drainage Distri
of Wyandotte County, Kansas; George Stumpf, L. J. Mason, an
Al Mebus, Greeting:

We command you and every one of you, that you appear befo
our Judge of our Circuit Court of the United States of America f
the District of Kansas, First Division, at the City of Topeka, in sa
District, on the first Monday in the month of February, next, t
answer the Bill of Complaint of The Metropolitan Water Compan
this day filed in the Clerk's office of said Court in said City of T
peka, then and there to receive and abide by such judgment an
decree as shall then or thereafter be made, upon pain of judgme
being pronounced against you by default.

To the Marshal of the District of Kansas to Execute.

Witness, The Hon. Edward D. White, Chief Justice of the Su
preme Court of the United States of America, at the City of Topek
in said District, this 13th day of January in the year of our Lo
one thousand nine hundred and eleven.

[SEAL.] GEO. F. SHARITT, *Clerk.*

Memorandum.

The above named defendants are notified that unless they ente
their appearance in the Clerk's office of said Court, at the City
Topeka aforesaid, on or before the day to which the above writ
returnable, the complaint will be taken against them as confesse
and a decree entered accordingly.

GEO. F. SHARITT, *Clerk.*

25 *U. S. Marshal's Return.*

DISTRICT OF KANSAS, *ss:*

Received the within writ at Topeka, Ks. the Jany. 13, 1911, an
executed the same as follows, to wit: Served on the within name
The Kaw Valley Drainage District of Wyandotte County, Kan. b
delivering to W. H. Daniels, personally, president, a true and cert
fied copy of this writ with all the endorsements thereon and upo
George Stumpf, L. J. Mason and Al Mebus, by delivering to each
them personally a true and certified copy of this writ with all th
indorsements thereon in Kansas City, Kansas, January 14th, 191
Fees $12.75.

WILLIAM H. MACKEY, JR.,
U. S. Marshal,
By U. E. NEED, *Deputy.*

[Endorsed:] No. 8951. Circuit Court United States, District
Kansas. Metropolitan Water Company vs. The Kaw Valley Drai
age District of Wyandotte County, Kas. Chancery subpœna. R

turnable to rule day, first Monday in February A. D. 1911 Geo. F. Sharitt Clerk. —— —— Deputy Clerk. Filed Jany. 16 A. D. 1911 Geo. F. Sharitt Clerk. —— —— Deputy Clerk. Willard P. Hall Comp't's Sol.

26 In the Circuit Court of the United States for the District of Kansas.

No. —.

METROPOLITAN WATER COMPANY, Complainant,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, Kansas; George Stumpf, L. J. Mason, and Al Mebus, Defendants.

Affidavit of Lee Riley and Willard P. Hall in Support of the Application for Injunction.

Lee Riley and Willard P. Hall, first being duly sworn, upon their oaths state:

Lee Riley is agent of the Metropolitan Water Company in the prosecution of the bill of complaint herein and Willard P. Hall is the attorney of said company in said matter, and as such agent and attorney they, on the 5th day of January, 1911, at about the hour of 9:10 a. m. requested Mr. A. L. Berger, an attorney at law of Kansas City, Kansas, one of whose clients was interested in the matter of the condemnation of certain lands in Wyandotte County, Kansas, by The Kaw Valley Drainage District of Wyandotte County, Kansas, to inquire of and find out from Judge E. L. Fischer, of the District court of Wyandotte County, Kansas, whether, he, as such Judge, had appointed commissioners in In the Matter of the Application of the Kaw Valley Drainage District of Wyandotte County, Kansas, for the Appointment of Commissioners to Condemn Land, which application included the lands of the Metropolitan Water Company, as well as the lands of other parties, and Mr. Berger, in pursuance of such request, asked Judge Fischer for such information and reported to affiants that Judge Fischer said the commissioners had not been appointed; that thereupon said affiants caused a petition and bond for removal, in behalf of the Metropolitan Water Company, in said matter, to be filed in the office of the Clerk of the

27 District Court of Wyandotte County, Kansas, and then presented said petition and bond for removal forthwith to Judge Fischer at Kansas City, Kansas; the petition and bond for removal were presented to Judge Fischer as aforesaid at 9:20 a. m. of said 5th day of January, 1911; that copies of said petition and bond for removal are attached to the bill of complaint herein and marked Exhibit 1; that Judge Fischer said that he would hear the petition for removal at 12 o'clock noon, that day; thereupon affiants gave notice in writing to Messrs. Keplinger & Trickett, Attorneys for the Kaw Valley Drainage District of Wyandotte County, Kan-

sas, that the petition and bond for removal would again be called to the attention of Judge Fischer at 12 o'clock noon, on the 5th day of January, 1911, at Judge Fischer's chambers, attaching to said notice copies of said petition and bond for removal; that at 12 o'clock noon, of said day the said petition and bond for removal, in the presence of Messrs. Keplinger & Trickett, who had appeared in obedience to said notice, were called to the attention of Judge Fischer, who announced that he would pass upon the petition for removal at 2 o'clock in the afternoon of said day; that a few minutes after one o'clock on the afternoon of that day, affiant Hall asked Judge Keplinger for a copy of the application for the appointment of commissioners to condemn the land of Metropolitan Water Company and Judge Keplinger informed said affiant that he had no copy that he could permit said affiant to see; that immediately thereafter affiants asked Judge Fischer for leave to have a copy made of the application presented to him by The Kaw Valley Drainage District of Wyandotte County, Kansas, for the appointment of commissioners to condemn land, and Judge Fischer stated that said application had been delivered by him to the attorneys for said Drainage District and that he had appointed the commissioners upon said application; asked when he had appointed said commissioners, he said that he had appointed them that morning, but subsequent to the time that the petition and bond for removal were first presented to him as aforesaid and, as affiants understood and believe, Judge Fischer also said that the names of the commissioners had not been inserted in the written appointment until after 12 o'clock noon, of that day, although he had practically made up his
28 mind as to whom he would appoint.

And further affiants say not.

LEE RILEY.
WILLARD P. HALL.

Subscribed and sworn to before me, this 14" day of Jan. 1911.

[SEAL.] L. A. JOST,
Notary Public.

My commission expires Sept. 15, 1913.

Endorsed: No. 8951. Metropolitan Water Company, complainant—vs.—The Kaw Valley Drainage District of Wyandotte County, Kansas, George Stumpf, L. J. Mason and Al Mebus, Defendants. Affidavit of Lee Riley and Willard P. Hall in support of application for injunction. Filed Jany. 16, 1911. Geo. F. Sharitt, clerk.

29 In the Circuit Court of the United States for the District of Kansas, First Division.

METROPOLITAN WATER COMPANY, Complainant,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Defendant.

Affidavit.

STATE OF KANSAS,
Wyandotte County, ss:

E. L. Fischer being first duly sworn on oath says that he is the Judge of the District court of Wyandotte County, Kansas; that on the evening of January 4th, 1911, C. W. Trickett, as attorney for The Kaw Valley Drainage District, presented to this affiant an application for the appointment of Commissioners to condemn land on the left bank of the Kansas River; that no other petition was presented at said time. That the next morning at about 9 o'clock a. m. the attorney for the Metropolitan Water Company presented to affiant a petition and bond for removal to the Federal Court; that said application for removal was argued at 12 o'clock a. m. and refused by me at 2 o'clock p. m. on said January 5, 1911; that thereafter and at 2:30 p. m. of said January 5, 1911, there was presented to me an application for the appointment of commissioners to condemn land for the right bank of the Kansas River and I appointed as commissioners for said right bank George Stumpf, Al Mebus and L. J. Mason.

And affiant further says that no application had been presented to me for the right bank of said river nor was any such application pending at the time of the presentation of the petition and bond for removal above referred to, and that no petition or bond was presented to this affiant other than the one above referred to and at the time stated, and further affiant saith not.

E. L. FISCHER.

30 Subscribed and sworn to before me this 14th day of January, 1911.

[SEAL.]

R. J. McFARLAND,
Clerk Dist. Court,
By J. P. FOX, *Deputy.*

Endorsed: No. 8951. Metropolitan Water Co. vs. Kaw Valley Drainage Board. Affidavit of Judge Fischer. Filed January 16, 1911. Geo. F. Sharitt clerk.

west bank of said river and if affiant had known said fact at said time he would have informed the complainant's attorneys that they were not interested in the application at that time pending before the Honorable E. L. Fischer.

And affiant further says that after the attorney of the complainant left affiant's office, that he (affiant) called by telephone the engineers of The Kaw Valley Drainage District to ascertain what if any land the complainant owned on the left or West bank of the river and that said engineers were unable to give positive information and that affiant did not know for a certainty that the complainant had no property within the boundaries named in the application then pending until he read the bill of complaint filed herein.

And affiant further says that the application for the appointment of commissioners to condemn land on the right or East bank of the river embracing the lands described in the bill of complaint herein was presented by this affiant to Honorable E. L. Fischer at 2:30 p. m. on January 5, 1911, and further affiant saith not.

C. W. TRICKETT.

35 Subscribed and sworn to before me this 14 day of January, 1911.

[SEAL.] MADELON DEROCHE,
Notary Public.

My commission Expires Feb. 11, 1912.

Endorsed: No. 8951. Metropolitan Water Co. vs. Drainage Board. Affidavit of C. W. Trickett. Filed Jan'y 16, 1911. Geo. F. Sharitt, clerk.

36 In the Circuit Court of the United States for the District of Kansas.

In Equity. No. —.

METROPOLITAN WATER COMPANY, Complainant,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY Kansas; George Stumpf, L. J. Mason, and L. Mebus, Defendants.

Temporary Injunction.

The application of the Metropolitan Water Company, the above entitled complainant, for a temporary injunction coming on to be heard, Metropolitan Water Company being represented by Willard P. Hall, its attorney, and The Kaw Valley Drainage District of Wyandotte County, Kansas, and the other defendants above named by their attorney C. W. Trickett, and it appearing to the court that the condemnation proceeding begun by the Kaw Valley Drainage District of Wyandotte County, Kansas, for the condemnation of certain lands of complainant included and contained in the lands described on the East side of the Kansas River in the application of

said Drainage District to Judge E. L. Fischer of the District court of Wyandotte County, Kansas, was properly and legally removed prior to the appointment of commissioners by Judge E. L. Fischer and that thereafter Judge Fischer unlawfully appointed the individual defendants above named commissioners for ascertaining and appraising the value of all said lands, including complainant's, to be taken and the damages that would be caused thereby, and that said commissioners are about to proceed with the ascertainment and appraisement of the value of complainant's land and the damages to be caused by the taking of it.

Now, it is hereby ordered, adjudged and decreed that the said
The Kaw Valley Drainage District of Wyandotte County,
37 Kansas, is hereby enjoined and restrained, until the further
order of this court, from prosecuting said condemnation proceeding before the said commissioners, so far as the same relates to complainant's land, and that said commissioners are hereby enjoined and restrained, each and all of them, until the further order of this court, from taking any further action under their appointment as commissioners by Judge E. L. Fischer, of the Wyandotte County District Court of Kansas, so far as relates to the land of complainant, or any part of it, and from appraising the value of said land and estimating the damages that will be done by the appropriation thereof by said Drainage District.

This order is to become effective only upon complainant filing herein an injunction bond, in the usual form, in favor of the above named defendants, in the penal sum of Twenty-five hundred ($2500.00) dollars, to be approved by the Judge of this court.

The Kaw Valley Drainage District of Wyandotte County, Kansas, has leave to apply, forthwith, or at its pleasure, to this court, in the condemnation proceeding aforesaid for the appointment of commissioners to assess the value of complainant's land sought to be taken in said proceeding, and to appraise the damages that may be caused by such taking.

JOHN C. POLLOCK, *Judge.*

January 16th, 1911.

Endorsed: No. 8951. Metropolitan Water Company, complainant, vs. The Kaw Valley Drainage District of Wyandotte County, Kansas, et al., Defendants. Temporary Injunction. Filed Jan. 16, 1911. Geo. F. Sharitt, clerk.

38

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY.

Whereas, the Globe Surety Company of Kansas City, Missouri, a corporation duly incorporated under the laws of the State of Missouri, has deposited with the Secretary of the Treasury its articles of incorporation and the statement required by Section 3 of the Act of Congress approved August 13, 1894, as amended by the act of Congress approved March 23, 1910, allowing certain corporations to be accepted as sole surety on recognizances, stipulations, bonds and undertakings permitted or required by the laws of the

United States to be given with one surety or with two or more sureties; and,

Whereas, I am satisfied by an examination of the affairs of the Globe Surety Company, which I have caused to be made at its own expense, that said Company has a paid up capital of $500,000 in cash, that said company is able to keep and perform its contracts, and that it has authority, under its charter to do the business provided for in the Acts above referred to;

Now, therefore, the said Globe Surety Company of Kansas City, Missouri, is hereby granted authority, under the provisions of said Act, to qualify as sole surety on recognizances, stipulations, bonds and undertakings permitted or required by the laws of the United States, executed in the State of Missouri, and also to execute such obligations beyond the limits of the said State in any judicial district of the United States in which it shall have appointed a process agent conformably to the provisions of Section 2 of said Act.

This certificate shall expire on the first day of July, 1911, unless sooner revoked.

In witness whereof I have hereunto set my hand and caused the official seal of the Treasury Department to be hereto affixed this fifteenth day of November, nineteen hundred and ten.

[SEAL.] FRANKLIN MACVEAGH,
Secretary.

39 TREASURY DEPARTMENT,
WASHINGTON, D. C., *December* 10, 1910.

The annexed is a true copy of the original authorization issued by the Secretary of the Treasury to Globe Surety Company of Kansas City, Missouri, to do business under the Act of Congress approved August 13, 1894, as ameneded by the Act of Congress, approved March 23, 1910.

Witness my hand and the seal of the Department.

[SEAL.] CHAS. LYMAN,
Chief Division of Appointments.

40 In the Circuit Court of the United States for the District of Kansas.

In Equity. No. —.

METROPOLITAN WATER COMPANY, Complainant,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, Kansas; George Stumpf, L. J. Mason, and Al Mebus, Defendants.

Injunction Bond.

Bond No. 5695.

THE UNITED STATES OF AMERICA,
District of Kansas:

Know all men by these presents: That we, Metropolitan Water Company, as principal, and Globe Surety Company, of Kansas City, Missouri, as surety, are firmly bound unto The Kaw Valley Drainage District of Wyandotte County, Kansas, George Stumpf, L. J. Mason and Al Mebus, in the penal sum of Two Thousand five hundred (2500) dollars, to the payment of which we bind ourselves, each for itself, and its successors and assigns, firmly by these presents.

Sealed with our seals and dated this 16th day of January, 1911.

The condition of the above obligation is such that whereas the above named Metropolitan Water Company, a corporation created, organized and existing under and by virtue of the laws of the State of West Virginia, having filed in the above entitled suit a bill against the Kaw Valley Drainage District of Wyandotte County, Kansas, and the other defendants above named, and having obtained an allowance of a temporary injunction as prayed for in said bill against all said defendants from said court. Now, if the said Metropolitan Water Company shall abide the decision of said court and pay all moneys and costs which shall be adjudged against it in case said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

41 In witness whereof, we, the Metropolitan Water Company and Globe Surety Company of Kansas City, Missouri, have hereunto set our hands and seals this 16th day of January, 1911.

METROPOLITAN WATER CO.,
By LEE RILEY, *Agt.*
[SEAL.]
[SEAL.] GLOBE SURETY COMPANY OF KANSAS CITY, MISSOURI,
By JAS. VAN BUREN, *Vice-President.*

Attest:
E. SANFORD MILLER,
Assistant Secretary. [SEAL.]

STATE OF MISSOURI,
County of Jackson, ss:

On the 16th day of January in the year nineteen hundred eleven before me personally came Jas. Van Buren, to me known who being by me duly sworn did depose and say, that he resides in Kansas City, Missouri; that he is the Vice-President of the Globe Surety Company of Kansas City, Missouri, the corporation described in and which executed the annexed bond of Metropolitan Water Company that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

And the said Jas. Van Buren further states that he is acquainted with E. Sanford Miller and knows him to be the Ass't Secretary of said corporation; that the signature of the said E. Sanford Miller subscribed to said instrument is in the genuine handwriting of said E. Sanford Miller and was thereto affixed by order of the Board of Directors in the presence of him, the said Vice-President.

JAS. VAN BUREN.
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 16th day of January, 1911.

[SEAL.] EDNA E. TUTT,
Notary Public.

My commission expires Oct. 22, 1914.

42 STATE OF MISSOURI,
County of Jackson, ss:

On this 16th day of January, 1911, appeared before me Lee Riley who having been first duly sworn, on his oath deposes and says that he is the duly authorized agent of the Metropolitan Water Company in this behalf; that the seal affixed to the foregoing instrument is the seal of said corporation and that said instrument is signed and sealed on behalf of said corporation by authority.

LEE RILEY.

[SEAL.] EDNA E. TUTT,
Notary Public, Jackson County, Mo.

My commission expires Oct. 22, 1914.

This bond taken and approved by me this 17th day of Jan'y 1911.

JOHN C. POLLOCK, *Judge.*

Endorsed: #8951. Metropolitan Water Company, complainant vs. the Kaw Valley Drainage District of Wyandotte County, Kansas, et al., Defendants. Injunction Bond. Filed Jan'y 17, 1911 Geo. F. Sharitt, clerk

43 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8951.

METROPOLITAN WATER COMPANY, Complainant,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, et al., Defendants.

Entry of Appearance.

To the Clerk:

Without admitting jurisdiction, we hereby enter our appearance as solicitors and counsel for the defendants in the above entitled suit. Dated February 3rd, 1911.

KEPLINGER & TRICKETT,
Solicitors and Counsel for Defendants.

Endorsed: No. 8951. Metropolitan Water Company vs. Kaw Valley Drainage District et al. Entry of Appearance. Filed Feb. 4, 1911 Geo. F. Sharitt, clerk.

44 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8951.

METROPOLITAN WATER COMPANY, Complainant,
vs.
THE KAW VALLEY DRAINAGE DISTRICT et al., Respondents.

Demurrer.

Come now the respondents and not confessing any of the matters in the complainants' bill of complaint to be true, do*th* demur to said bill and for cause of demurrer showeth that said bill of complaint does not state facts sufficient to entitle the complainants to any relief.

Wherefore and for divers other good causes of demurrer appearing in the said bill the respondents do*th* demur thereto and demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

L. W. KEPLINGER,
C. W. TRICKETT,
Solicitors for Respondents.

STATE OF KANSAS,
Wyandotte County, ss:

W. H. Daniels being duly sworn deposes and says that he is the President of the Board of Directors of The Kaw Valley Drainage District, respondent, and that this demurrer is not interposed to delay the cause or any proceedings therein.

W. H. DANIELS.

Subscribed and sworn to before me this 3rd day of March, 1911.
[SEAL.] MADELON DEROCHE,
Notary Public.

My commission expires Feb. 11, 1912.

45 *Certificate of Counsel.*

I hereby certify that I am solicitor and of counsel for the respondents in the above entitled cause and that in my opinion the foregoing demurrer of the respondents to the bill of complaint is well founded in point of law and proper to be filed in the above entitled cause.

C. W. TRICKETT,
Solicitor and Counsel for Respondents.

Endorsed: No. 8951. Metropolitan Water Co. vs. Kaw Valley Drainage District et al. Demurrer to Bill. Filed M'ch 4, 1911 Geo. F. Sharitt, clerk.

46 In the Circuit Court of the United States for the District of Kansas, First Division.

In Equity. No. 8951.

METROPOLITAN WATER COMPANY, Complainant,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, Kansas; George Stumpf, L. J. Mason, and L. Mebus, Defendants.

Decree.

The above entitled cause came on for hearing on October 2nd, 1911, on demurrer to the bill of complaint, Messrs. Keplinger & Trickett, appearing for defendants in support of the demurrer and Willard P. Hall appearing for complainant in opposition to the demurrer; after full hearing and consideration, the court finds that the bill of complaint seeks an injunction against defendants in aid of this court's jurisdiction of a condemnation proceeding instituted by the Kaw Valley Drainage District of Wyandotte County, Kansas, for the condemnation and appropriation by it of certain lands of complainant herein, which proceeding complainant undertook to

remove to this court by petition and bond in due form and with adequate security, and by timely filing with the clerk of this court a true transcript of the record in said proceeding which proceeding is still pending in this court undisposed of; the court further finds that the allegations of the bill of complaint show that this court has no jurisdiction of said proceeding, and, therefore, no jurisdiction, power or authority, to grant the relief prayed for in said bill of complaint, or any other relief in this case, and for this reason the court orders, adjudges and decrees that the demurrer to the bill of complaint be sustained; and counsel for complainant declining to plead further and announcing that complainant would stand
47 on the bill of complaint in its present form, the court hereby orders, adjudges and decrees that said bill of complaint be dismissed at the cost of complainant.

JOHN C. POLLOCK, *Judge.*

October 2, 1911.

Endorsed: In Equity, No. 8951. Metropolitan Water Company, complainant, vs. The Kaw Valley Drainage District of Wyandotte County, Kansas, George Stumpf, L. J. Mason, and Al Mebus, Defendants. Decree. Filed Oct. 2, 1911 Geo. F. Sharitt, Clerk.

48 In the Circuit Court of the United States for the District of Kansas, First Division.

In Equity. No. 8951.

METROPOLITAN WATER COMPANY, Complainant,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, Kansas; George Stumpf, L. J. Mason, and Al Mebus, Defendants.

Petition For Appeal.

The above named complainant, Metropolitan Water Company, conceiving itself aggrieved by the order and decree made and entered in the above entitled cause on the 2nd day of October, 1911, wherein and whereby it was ordered, adjudged and decreed that the demurrer to the bill of complaint be sustained, and that said bill of complaint be dismissed at the costs of complainant, does hereby appeal from the said order and decree to the Supreme court of the United States, for the reasons specified in the assignment of errors filed herein, and it prays that this appeal may be allowed, and that a transcript of the record, papers and proceedings upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States, and also that an order be made fixing the amount of security which complainant shall give and furnish upon such appeal and that upon the giving of such security all further proceedings in this court be suspended and stayed until the

determination of said appeal by said Supreme Court of the United States.

October 7, 1911.

WILLARD P. HALL,
Solicitor for Complainant, Metropolitan Water Company.

49 Endorsed: In Equity No. 8951 Metropolitan Water Company, complainant vs. The Kaw Valley Drainage District of Wyandotte County, Kansas, et al., Defendants. Petition for Appeal. Filed Oct. 9, 1911. Geo. F. Sharitt, clerk.

50 In the Circuit Court of the United States for the District of Kansas, First Division.

In Equity. No. 8951.

METROPOLITAN WATER COMPANY, Complainant,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, Kansas; George Stumpf, L. J. Mason, and Al Mebus, Defendants.

Assignment of Errors.

Metropolitan Water Company, complainant herein, in connection with and as a part of its petition for appeal herein, makes the following assignment of errors which it avers were committed by the court in the rendition of the decree against this complainant appearing upon the record herein, that is to say:

1. This court erred in making an order, judgment and decree sustaining the demurrer to the bill of complaint, and in dismissing said bill of complaint, on the ground that the court did not have jurisdiction of the condemnation proceeding instituted by the Kaw Valley Drainage District of Wyandotte County, Kansas, for the condemnation and appropriation by it of certain lands of complainant, which proceeding had been removed to this court wherein it was then and still is now pending.

2. This court erred in making said decree on the ground that said condemnation proceeding was not a suit or action, at the time of its removal to this court, within the meaning of the Judiciary Act.

3. This court erred in making said decree on the ground that said condemnation proceeding was not legally removed to this court.

4. This court erred in making said decree on the ground that this court had not jurisdiction, power and authority to grant the

51 relief prayed for in the bill of complaint.

Wherefore, complainant prays that said decree be reversed.

October 7, 1911.

WILLARD P. HALL,
Solicitor for Complainant.

Endorsed: In Equity. No. 8951. Metropolitan Water Company, complainant, vs. The Kaw Valley Drainage District of Wyandotte County, Kansas, et al., Defendants. Assignment of Errors. Filed Oct. 9, 1911. Geo. F. Sharitt, Clerk.

52 In the Circuit Court of the United States for the District of Kansas, First Division.

In Equity. No. 8951.

METROPOLITAN WATER COMPANY, Complainant,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, Kansas; George Stumpf, L. J. Mason, and Al Mebus, Defendants.

Order Allowing Appeal.

On motion of Willard P. Hall, solicitor and of counsel for complainant, Metropolitan Water Company, it is ordered that an appeal to the Supreme Court of the United States from the final decree heretofore filed and entered herein be, and the same hereby is allowed, and that a certified transcript of the record and all proceedings herein be forthwith transmitted to said Supreme court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of Five Hundred dollars, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal; and that the bond offered by complainant be, and the same hereby is approved, and ordered to be filed.

JOHN C. POLLOCK, *Judge.*

October 9, 1911.

Endorsed: In Equity. No. 8951. Metropolitan Water Company, complainant, vs. The Kaw Valley Drainage District of Wyandotte County, Kansas, et al., Defendants. Order allowing appeal. Filed Oct. 9, 1911. Geo. F. Sharitt, clerk.

53 In the Circuit Court of the United States for the District of Kansas, First Division.

In Equity. No. 8951.

METROPOLITAN WATER COMPANY, Complainant,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, Kansas; George Stumpf, L. J. Mason, and Al Mebus, Defendants.

Certificate to Supreme Court of Question of Jurisdiction.

The United States Circuit Court for the District of Kansas, First Division, sitting at the city of Kansas City, Kansas on the 9th day of

October, 1911, during the October term of said court, certifies to the Supreme Court of the United States as follows:

The bill of complaint in the above entitled cause sought injunctive relief against defendants in aid of this court's jurisdiction of a condemnation proceeding instituted by The Kaw Valley Drainage District of Wyandotte County, Kansas, for the condemnation and appropriation by it of certain lands of complainant, which proceeding complainant undertook to remove to this court; the bill of complaint showed that the proceedings by complainant for removal were regular in all respects and that the condemnation proceeding had been legally removed, if said proceeding was such a suit or action in the meaning of the Judiciary Act as to be removable, and that said proceeding was still pending in this court; defendants demurred to the bill of complaint on the ground, among others, that the condemnation proceeding was not such a suit or action when removed as to be removable under the Judiciary act; this court heard and decided the demurrer on October 2, 1911, the first day of its October term, 1911, sustaining the demurrer on the sole
54 ground above stated, also holding that on that same ground this court had no jurisdiction of said bill of complaint and, complainant's counsel electing to stand on the bill of complaint and declining to plead further, ordered, adjudged and decreed that the bill of complaint be dismissed.

On petition of complainant an appeal has this day been allowed to it by this court from said decree to the Supreme court of the United States.

This court further certifies to the Supreme court of the United States that the jurisdiction of this court of said condemnation proceeding and of this bill of complaint was in issue as aforesaid and was denied by this court in its decree as hereinbefore stated, and that said condemnation proceeding is still pending in this court undisposed of.

This court further certifies to the Supreme court of the United States for its decision the following questions of its jurisdiction in issue and decided, as aforesaid, to-wit:

1. Did this court have jurisdiction of said condemnation proceeding?

2. Was said condemnation proceeding when removed a suit or action within the meaning of the Judiciary Act?

3. Did this court, as a Federal Court, have the jurisdiction, power or authority to issue an injunction in aid of this court's jurisdiction of said condemnation proceeding, or to grant any other relief on the bill of complaint, in view of section 720 of the Revised Statutes of the United States?

JOHN C. POLLOCK,
District Judge, Acting as Circuit Judge.

Endorsed: In Equity. No. 8951. Metropolitan Water Company, complainant, vs. The Kaw Valley Drainage District of Wyandotte County, Kansas, et al., Defendants. Certificate to Supreme Court of question of Jurisdiction. Filed Oct. 9, 1911. Geo. F. Sharitt, clerk.

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the District of Kansas, Greeting:

[SEAL.]

Whereas, lately in the Circuit Court of the United States for the District of Kansas, before you or some of you, in cause between Metropolitan Water Company of West Virginia, a Corporation, Complainant, and The Kaw Valley Drainage District of Wyandotte County, Kansas, George Stumpf, L. J. Mason and Al Mebus, Defendants wherein the order and decree of the said Circuit Court granting a temporary injunction in said cause, entered on the 16th day of January A. D. 1911, is in the following words viz:

"The application of the Metropolitan Water Company, the above entitled complainant, for a temporary injunction coming on to be heard, Metropolitan Water Company being represented by Willard P. Hall, its attorney, and The Kaw Valley Drainage District of Wyandotte County, Kansas, and the other defendants above named, by their attorney C. W. Trickett, and it appearing to the Court that the condemnation proceeding begun by the Kaw Valley Drainage District of Wyandotte County, Kansas, for the condemnation of certain lands of complainant included and contained in the lands described on the East side of the Kansas River in the application of said Drainage District to Judge E. L. Fischer of the District Court of Wyandotte County, Kansas, was properly and legally removed prior to the appointment of commissioners by Judge E. L. Fischer and that thereafter Judge Fischer unlawfully appointed the individual defendants above named commissioners for ascertaining and appraising the value of all said lands, including complainant's to be taken and the damages that would be caused thereby, and that said commissioners are about to proceed with the ascertainment and appraisement of the value of complainant's land and the damages to be caused by the taking of it,

Now, it is hereby ordered, adjudged and decreed that the
56 said The Kaw Valley Drainage District of Wyandotte County, Kansas, is hereby enjoined and restrained, until the further order of this court, from prosecuting said condemnation proceeding before the said commissioners, so far as the same relates to complainant's land, and that said commissioners are hereby enjoined and restrained, each and all of them, until the further order of this court, from taking any further action under their appointment as commissioners by Judge E. L. Fischer, of the Wyandotte County District Court of Kansas, so far as relates to the land of complainant, or any part of it, and from appraising the value of said land and estimating the damages that will be done by the appropriation thereof by said Drainage District.

This order is to become effective only upon complainant filing herein an injunction bond, in the usual form, in favor of the above named defendants, in the penal sum of twenty-five hundred (2500.00) dollars to be approved by the Judge of this court.

The Kaw Valley Drainage District of Wyandotte County, Kansas,

has leave to apply, forthwith, or at its pleasure, to this court, in the condemnation proceeding aforesaid for the appointment of commissioners to assess the value of complainant's land sought to be taken in said proceeding, and to appraise the damages that may be caused by such taking.

JOHN C. POLLOCK, *Judge.*

January 16th, 1911."

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large appears;

And whereas, in the present term of December, in the year of our Lord one thousand nine hundred and ten, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of the record from the Circuit Court of the United States for the District of Kansas, and was argued by counsel.

57 On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the order and decree of the said Circuit Court, granting an injunction in this cause, be, and the same is hereby reversed with costs and that The Kaw Valley Drainage District of Wyandotte County, Kansas, and George Stumpf, Al Mebus and L. J. Mason, have and recover against the Metropolitan Water Company the sum of Thirty-eight and 60/100 dollars for their costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court with directions for proceedings in accordance with the opinion of this Court.

February 24, 1911.

You therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the Twenty-eighth day of April, in the year of our Lord one thousand nine hundred and eleven.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Costs of Appellants:

Clerk	$18.60
Printing Record	None
Attorney	$20.00
	$38.60

Endorsed: No. 8951. United States Circuit Court of Appeals No. 3566 December Term, 1910. The Kaw Valley Drainage District of Wyandotte County, Kansas, et al., Appellants, vs. Metropolitan Water Company. Mandate. Filed May 1, 1911. Geo. F. Sharitt, clerk.

58 In the Circuit Court of the United States for the District of Kansas, First Division.

In Equity. No. 8951.

METROPOLITAN WATER COMPANY, Complainant,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, Kansas; George Stumpf, L. J. Mason, and Al Mebus, Defendants.

Appeal Bond.

Bond No. 6173.

Know all men by these presents; That we, Metropolitan Water Company, as principal, and Globe Surety Company of Kansas City, Missouri, as surety, are firmly bound unto The Kaw Valley Drainage District of Wyandotte County, Kansas, George Stumpf, L. J. Mason and Al Mebus, the above named defendants, in the penal sum of five hundred dollars, to the payment of which we bind ourselves, each for itself and its successors and assigns, firmly by these presents:

Sealed with our seals and dated this 9th day of October, 1911.

The condition of the above obligation is such that

Whereas, lately a decree in the above entitled suit was rendered against the said Metropolitan Water Company and in favor of the above named defendants, and the said Metropolitan Water Company has obtained an appeal from said decree to the Supreme court of the United States.

Now, if the said Metropolitan Water Company shall prosecute said appeal to effect, and answer all damages and costs, if it fail to make its appeal good, then the above obligation shall be void; else it shall remain in full force and virtue.

59 In witness whereof, we, the Metropolitan Water Company and the Globe Surety Company of Kansas City, Missouri, have hereunto set our hands and seals, this 9th day of October, 1911.

METROPOLITAN WATER COMPANY,
[SEAL.] By LEE RILEY, *Agent.*
GLOBE SURETY COMPANY OF KANSAS CITY, MISSOURI,
[SEAL.] By JAS. VAN BURDEN,
Vice-President.

Attest:
E. SANFORD MILLER,
Assistant Secretary.

5—844

STATE OF MISSOURI,
County of Jackson, ss:

On this 9th day of October, 1911, appeared before me, Lee Riley, who, having been first duly sworn, on oath deposes and says that he is the duly authorized agent of the Metropolitan Water Company in this behalf; that the seal affixed to the foregoing instrument is the seal of said corporation, and that said instrument is signed and sealed on behalf of said corporation by authority.

[SEAL.] SALLIE A. CREASON,
Notary Public within and for Jackson County, Missouri.

My commission expires May 6, 1915.

Endorsed: In Equity. No. 8951. Metropolitan Water Company, complainant, vs. The Kaw Valley Drainage District of Wyandotte County, Kansas, et al., Defendants. Appeal Bond. Filed Oct. 9, 1911. Geo. F. Sharitt, clerk.

60 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in Case No. 8951 wherein Metropolitan Water Company is complainant and The Kaw Valley Drainage District of Wyandotte County, Kansas, George Stumpf, L. J. Mason and Al Mebus are defendants.

I further certify that the Original Citation is hereto attached and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 21st day of October A. D. 1911.

[The Seal of the Circuit Court of the United States, District of Kansas. 1862.]

GEO. F. SHARITT, *Clerk.*

61 [Endorsed:] Transcript of Record. Supreme Court of the United States, October Term, 1911. No. —. Metropolitan Water Company, Appellant, vs. The Kaw Valley Drainage District of Wyandotte County, Kansas, et al., Appellees.

Endorsed on cover: File No. 22,920. Kansas C. C. U. S. Term No. 844. Metropolitan Water Company, appellant, vs. The Kaw Valley Drainage District of Wyandotte County, Kansas, et al. Filed October 28th, 1911. File No. 22,920.

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NUMBER 844.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

METROPOLITAN WATER COMPANY, APPELLANT,

VS.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, GEORGE STUMPF, L. J. MASON AND AL MEBUS, APPELLEES.

MOTION BY APPELLANT TO ADVANCE.

WILLARD P. HALL,
Attorney for Appellant.

NUMBER 844.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

METROPOLITAN WATER COMPANY, APPELLANT,

VS.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, GEORGE STUMPF, L. J. MASON AND AL MEBUS, APPELLEES.

MOTION BY APPELLANT TO ADVANCE.

The above entitled appellant, Metropolitan Water Company, respectfully moves the court to make an order advancing the hearing of this case as provided by Rule 32 of this court, and as grounds in support of this motion says:

This case has been brought directly to this court from the final decree of the Circuit Court for the District of Kansas under section 5 of the Act of March 3, 1891, chap. 517; the only question in issue is the question of the jurisdiction of the court below; and the questions in relation to that jurisdiction have been properly certified by said court to this court for the latter's decision.

The facts of the case, briefly stated, are as follows:

Appellee, Kaw Valley Drainage District of Wyandotte County, Kansas, a municipal corporation organized under the laws of Kansas, on January 4th, 1911, by its Board of Directors, presented its written application to the Judge of the District Court of Wyandotte County, Kansas, reciting the jurisdictional facts and praying for the appointment of commissioners to assess the damages to the owners of certain described lands, sought to be taken by the drainage district for its uses under the statutes of Kansas. A separate and distinct part of said lands belonged exclusively to appellant, which was and still is a corporation organized under and by virtue of the laws of West Virginia. On January 5th, 1911, appellant presented to the Judge of said State Court a petition and bond (in proper form and with adequate security) for the removal of the proceeding insofar as the same related to appellant's land to the Circuit Court of the United States for the District of Kansas. The ground of removal was diversity of citizenship. The removal was denied by the State Judge, and he appointed the individual appellees commissioners to act in the condemnation proceeding. Said commissioners proceeded to act under their appointment as if no removal had been taken to the Federal Court before their appointment had been made.

Therefore, on January 13, 1911, appellant, having prior thereto caused a transcript of the proceeding before the State Judge to be filed in the United States Circuit Court, filed a bill in aid of said court's jurisdiction in the removed case, asking for injunctive relief, temporary and permanent, restraining the drainage district and the condemnation com-

missioners from proceeding under the appointment made by the State Judge, on the ground that the proceeding had been removed before such appointment was made.

Said bill, though original in form, was not an original bill in fact, "but was ancillary and dependant, supplementary merely to the original suit and out of which it had arisen." The removed case was the original suit; the bill for injunction was merely ancillary and supplemental to that suit. *Freeman* v *Howe*, 24 How. 450, 460; *Mining Co.* v. *St. Paul Co.*, 2 Wall. 609, 633; *Krippendorf* v. *Hyde*, 110 U. S. 276, 281.

The Circuit Court granted a temporary injunction as prayed, and appellees here appealed from the order to the United States Circuit Court of Appeals for the 8th Circuit, wherein the appeal was heard before Circuit Judges Hook and Adams, and District Judge Munger. In an opinion by Judge Munger the order of the Circuit Court was reversed and the cause was remanded to be proceeded with in accordance with the opinion.

Appellees here filed a demurrer to the bill for injunction, and the Circuit Court, following the mandate of the United States Circuit Court of Appeals, sustained the demurrer on the ground that the condemnation proceeding was not a civil suit in the meaning of the Federal Judiciary Act when removed, that, therefore, the Circuit Court obtained no jurisdiction of said proceeding, and that the Circuit Court had no jurisdiction to issue an injunction in aid of its jurisdiction of said proceeding. Appellant declined to plead further and stood upon its bill, whereupon the Circuit Court dismissed said bill, and appellant brought the case here on appeal.

An exact precedent for bringing the case directly here on appeal is *Madisonville Traction Co.* v. *Mining Company*, 196 U. S. 239, 244. The only difference between that case and the case at bar on this point is that there the demurrer was overruled and the petitioner in the condemnation proceeding, defendant in the injunction suit, having refused to plead further, a final decree was entered in the Circuit Court permanently enjoining it from further prosecution in the State Court, and defendant appealed directly to this court, whereas in the case here the demurrer was sustained, final decree was entered against complainant and it appealed directly to this court.

Under the case cited, had final decree been entered against the drainage district, it could have appealed directly to this court. It is manifest that from a final decree in favor of the drainage district, the other party, this appellant, had the same right of direct appeal to this court.

It is needless to repeat that on this appeal the only question in issue is the jurisdiction of the Circuit Court.

Respectfully submitted,

WILLARD P. HALL,

Attorney for Appellant.

Kansas City, Missouri,
November 10, 1911.

To L. W. Keplinger and C. W. Trickett,
Counsel for Appellees:

You are hereby notified that on Monday, November 20th, 1911, or as soon thereafter as may be, appellant will present to the Supreme Court the above motion to advance this case.

WILLARD P. HALL,
Attorney for Appellant.

We acknowledge service of this notice and the receipt of a copy of the above motion.

.....

.....
Counsel for Appellees.

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NUMBER 844.

Supreme Court of the United States.

OCTOBER TERM, 1911.

METROPOLITAN WATER COMPANY, APPELLANT,

VS.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, GEORGE STUMPF, L. J. MASON AND AL MEBUS, APPELLEES.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF KANSAS.

STATEMENT AND BRIEF FOR APPELLANT.

WILLARD P. HALL,
Attorney for Appellant.

N. Y. Life Building,
Kansas City, Mo.

NUMBER 844.

Supreme Court of the United States.

OCTOBER TERM, 1911.

METROPOLITAN WATER COMPANY, APPELLANT,

VS.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, GEORGE STUMPF, L. J. MASON AND AL MEBUS, APPELLEES.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF KANSAS.

STATEMENT OF CASE.

The question here is as to the removability to the United States Circuit Court of condemnation proceedings begun under the drainage law of Kansas in the State tribunals provided by that law for such proceedings.

The Kaw Valley Drainage District of Wyandotte County, Kansas, is a public corporation organized and existing under and by virtue of the drainage law of the State of Kansas. Said law is article 3 of chapter 34 of the General Statutes of Kansas, 1909 (Dassler's), being sections 3000-3056 of said volume.

Said drainage district was organized for the purpose of protecting the territory adjacent to that portion of the Kansas River in that district from being flooded by that river in times of high water, by widening its channel so that it would be able to carry off all waters flowing into it. To that end the drainage law empowered the drainage district to appropriate any and all private

lands needed for that purpose by condemnation proceedings. The provisions of the law covering that subject are sections 3038-3046 of the volume aforesaid.

Those provisions differ in no material respect from the provisions regulating the exercise of the power of eminent domain in other cases in the State of Kansas unless it be in the provision relating to the decision by the board of directors of a drainage district as to the lands that will be required for widening the watercourse to be protected against. The drainage law authorizes a drainage district to employ engineers to aid it in determining what changes shall be made in the channel of the given watercourse (sections 3015 and 3018), and it requires the board of directors to cause a survey and description of the lands needed for the purpose of making such changes to be made by some competent engineer and filed with its secretary (section 3038).

This requirement appears to be a condition precedent to the right of a drainage district to appropriate the lands.

Thereupon the drainage district is authorized to make an order declaring necessary the appropriation of the lands described in such survey, setting forth the purposes of such appropriation (section 3038).

Thereafter the board of directors presents a written application to the judge of either the District Court or the Court of Common Pleas of the county where the land is located for the appointment of three commissioners to appraise the value of the lands sought to be taken and to assess the damages caused by the taking thereof. The judge makes the appointment in writing, under his hand as judge, and the board of directors files the application and appointment in the office of the Register of Deeds. The commissioners then qualify by taking the customary oath (section 3038).

The commissioners give notice by publication of the time and place when and where they will meet and proceed to appraise the lands taken and assess the damages caused by the taking (section 3039). At the appointed time and place they meet and make such appraisement and assessment. They may adjourn from time to time, and may make partial reports and must make a final report upon completing their duties. All such reports must be in writing and filed in the office of the Clerk of the County (section 3039). In their reports the commissioners must describe the land of each owner and separately appraise its value and assess his damages (section 3040). The County Clerk deposits a copy of every report in the office of the County Treasurer, and the drainage dis-

trict has ninety days thereafter in which to pay the amount of the award to the County Treasurer (section 3041). Upon such payment being made the drainage district becomes invested with the right to the possession and the *perpetual* use of the lands for its purposes (section 3042).

The landowner can appeal from the award of the commissioners to the District Court in the same manner as appeals are taken from a judgment of a justice of the peace, and a trial *de novo* is had on such appeal. But the appeal affects only the amount of compensation and does not delay the prosecution of the work if the drainage district pays the amount of the award to the County Treasurer, and executes a bond with surety, to be approved by the County Clerk to pay all costs and damages which the drainage district may be adjudged to pay in the District Court (section 3043).

The drainage district also can appeal from the award of the commissioners, in which event it need not make any deposit with the County Treasurer, but it shall not have the right to occupy the land; upon final judgment upon such appeal the drainage district may pay the amount awarded the landowner into court and thereupon take possession of the land (section 3044).

A copy of the sections of the Kansas statute herein specifically mentioned is annexed hereto as "Appendix."

On January 4th, 1911, the Kaw Valley Drainage District presented its application in proper form to the judge of the District Court of Wyandotte County, asking for the appointment of commissioners to ascertain the value of certain described lands sought to be taken by it and to assess damages caused by the taking thereof. The lands described belonged in different distinct parcels to different and separate owners. Appellant was and is the sole owner of a tract of land sought to be taken. On the following day, January 5th, and prior to the making of such appointment, appellant presented a petition and bond in proper form and with adequate security to the judge of said court for the removal of the proceeding insofar as it related to it and its land to the Circuit Court of the United States for the District of Kansas. The petition and bond for removal were also filed with the clerk of the District Court of Wyandotte County, as well as being presented to the judge of that court. Said judge denied the removal, and then appointed the three individual respondents herein commissioners. They qualified at once and caused immediate publication of a notice of the time and place when and where they would meet and proceed to perform their duties.

Appellant filed a transcript of the proceeding in the office of the clerk of the Circuit Court of the United States for the District of Kansas, and then filed its bill in said clerk's office asking for injunctive relief, temporary and permanent, against the drainage district and the commissioners, restraining them from proceeding with the appraisement of the value of petitioner's land and the assessment of damages for its taking, on the ground that the proceeding in which the commissioners were appointed by the judge of the State Court had been removed to the Federal Court before such appointment was made (Rec. 2-7).

Appellant's application for a temporary injunction was sustained, and a temporary injunction was issued as prayed (Rec. 20-21). An appeal was taken to the United States Circuit Court of Appeals for the Eighth Circuit. The United States Circuit Court of Appeals held that the condemnation proceeding was not removable at the time the removal was had, that the Circuit Court obtained no jurisdiction by such attempted removal, and that the temporary injunction in aid of such jurisdiction, therefore, was improvidently awarded; and accordingly the United States Circuit Court of Appeals reversed the judgment of the Circuit Court granting the temporary injunction, and remanded the cause for proceedings in compliance with the court's opinion (186 Fed. Rep. 315).

Appellees here, defendants in the bill, demurred to the bill, substantially on the ground that the condemnation proceeding was not a civil suit in the meaning of the Federal Judiciary Act when removed, that, therefore, the Circuit Court obtained no jurisdiction of said proceeding, and that said court had no power to issue an injunction in aid of its jurisdiction of said proceeding. The Circuit Court sustained the demurrer solely upon that ground. Appellant declined to plead further and stood upon its bill, whereupon the court rendered a final decree dismissing the bill (Rec 26).

Thereupon appellant brought the case directly to this court by appeal from the final decree under section 5 of the Act of March 3, 1891, chap. 517; the only question in issue being the question of the jurisdiction of the court below, and the questions in relation to that jurisdiction being properly certified by that court to this court for the latter's decision. On appellant's motion, the court has advanced the hearing of the case under rule 32.

The facts in the case are undisputed. They appear from the allegations of the bill which were admitted by the demurrer. The questions on this appeal appear from the

ASSIGNMENT OF ERRORS.

The following assignment of errors (omitting formal parts) was filed by appellant in the court below:

"1. This court erred in making an order, judgment and decree sustaining the demurrer to the bill of complaint, and in dismissing said bill of complaint, on the ground that the court did not have jurisdiction of the condemnation proceeding instituted by the Kaw Valley Drainage District of Wyandotte County, Kansas, for the condemnation and appropriation by it of certain lands of complainant, which proceeding had been removed to this court wherein it was then and still is now pending.

2. This court erred in making said decree on the ground that said condemnation proceeding was not a suit or action, at the time of its removal to this court, within the meaning of the Judiciary Act.

3. This court erred in making said decree on the ground that said condemnation proceeding was not legally removed to this court.

4. This court erred in making said decree on the ground that this court had not jurisdiction, power and authority to grant the relief prayed for in the bill of complaint" (Rec. 25).

BRIEF.

I.

The condemnation proceeding was removable immediately upon the presentation to the state judge by the drainage district of the written application for the appointment of commissioners to assess the value of the land sought to be taken. The presentation of said application initiated the proceeding and it was a civil suit within the meaning of the Federal Judiciary Act from its inception and as such removable at once.

The removability of condemnation proceedings to the United States Circuit Courts under the Federal Judiciary Act of 1887, 1888, was settled in *Traction Company* v. *Mining Co.*, 196 U. S. 239.

Mason City R. R. Co. v. *Boynton*, 204 U. S. 570.

Prior to the Traction Company Case it had been doubtful whether such proceedings were removable under that Act. Those proceedings had been held to be removable under the Judiciary Act of 1875, but under the latter Act a case might be removable to the United States Circuit Court that could not have been brought in it, and when the Act of 1887, 1888, made a change in that regard and provided that no case should be removable to any Circuit Court that could not originally have been brought in that court, the question became mooted whether such proceedings could be brought in the Circuit Courts or removed thereto from the State courts. This question was finally decided in the Traction Company Case.

There was a divided court in that case. Mr. Justice Harlan wrote the opinion of the court; Mr. Justice Holmes expressed the views of the dissenting members of the court.

The difference between the members of the court was not as to mere form but was as to fundamental principles.

The court held that where a State provides for the taking of private property for public use, the taking to become effective on condition that the value of the property be ascertained in a judicial proceeding (without regard to its form) and the value thus ascertained paid before possession of the property can be taken, such proceeding in its essential features is a suit of a civil nature, within the meaning of the Judiciary Act, and as such removable to the United States Circuit Court, other jurisdictional facts existing. The contention voiced by Mr. Justice Holmes was that such condition (without regard to the form of the proceeding, and whether in court or not) is a part of the process appropriating the property by the State and is beyond the interference of Congress, and that Congress cannot confer jurisdiction upon the courts of the United States of anything connected with a condemnation proceeding under the power of a State, except where the State provides a judicial proceeding for ascertaining just compensation after the taking of the property shall have been completed, in which event such proceeding would be a civil suit.

The view of the court was that in such a case as that stated the State does not appropriate the property by or through the proceeding for ascertaining the compensation to be paid, but that the appropriation is completed before such proceeding is instituted, and that only the right to take possession of the property is postponed until the compensation is ascertained in such proceeding and paid to the owner. The view of Mr. Justice Holmes was that the appropriation by the State is completed by such proceeding.

The opinion of the court in that case finally settled the matter, and it became no longer open to controversy. That this was the view of all the members of the court clearly appears from the unanimous opinion of the court in the subsequent case of *Mason City R. R.* v. *Boynton*, 204 U. S. 570, written by Mr. Justice Holmes, whose opening sentence is:

> "In *Madisonville Traction Company* v. *St. Bernard Mining Company*, 196 U. S. 239, it was decided that proceedings of this character could be removed to the United States Circuit Court."

This construction of the Judiciary Act has been acquiesced in by Congress. The provisions in relation to the removal of causes have not been changed, and they have been carried without alteration into the new Federal Code.

Under the drainage law of Kansas the appropriation of the land desired is made by the order of the drainage district "declaring that the appropriation of such land is necessary and setting forth for what purpose the same is to be used" (sec. 3038). The subsequent application by the drainage district for the appointment of commissioners to make appraisement and assessment of damages therefor, their appointment and the proceedings before them, are not for the purpose of appropriating the land (that has already been accomplished by the order of the drainage district), but are merely for the purpose of ascertaining the compensation to be paid to the land owner, which payment must be made before his possession can be disturbed. The award of damages does not appropriate the land, but like a judgment of any court fixes the compensation to be paid. The legal effect of the law is precisely the same as it would have been had it in terms appropriated (describing it) the land desired in any given case by a drainage district and had provided that the drainage district should not take possession of the land until it should have caused the ascertainment and payment of compensation to the landowner in precisely the same manner as that provided for in the existing law. The appropriation of the land by the drainage district, under the existing law and by its authority, must have the same legal effect as if the law itself had appropriated the land, directly and expressly.

Where the appropriation of land is made directly by legislative enactment, wherein it is provided that before possession shall be taken the compensation shall be ascertained and paid in a pre-

scribed judicial manner, the separation of the act of appropriation from the judicial proceeding for ascertaining the compensation may be a little clearer than when the appropriation is made by an administrative board, as under the drainage law, but the separation really is no more certain. The two acts, one appropriating the land by sovereign fiat and the other ascertaining just compensation to be paid therefor in a judicial proceeding, are as separate and distinct as any two acts of government can be. This from the very nature of the two acts, and it matters not how closely connected they may be in time or other circumstances. The judicial ascertainment of compensation is not a mere administrative offer of the amount found to the landowner which he may accept or reject as he may please, but it is a binding adjudication that the amount found is just, and the landowner must accept it and surrender possession of his land.

The important question on this appeal, therefore, is, Is the proceeding provided for by the drainage law for ascertaining the value of the land taken a civil suit? Counsel for the drainage district concede, and the United States Circuit Court of Appeals, in the case at bar (186 Fed. Rep. 315), also concedes that such proceeding becomes a civil suit after the commissioners make their award and an appeal therefrom has been taken by the landowner to the State District Court, but counsel contend, and their contention has been sustained by the United States Circuit Court of Appeals in this case, that until after such appeal has been taken the proceeding is not a civil suit.

The real question, therefore, is, Is such proceeding a civil suit from its inception, to-wit, from the time that the drainage district presents to a judge of the State court a written application for the appointment of commissioners?

The constitutional prohibitions against a State taking private property without paying just compensation do not require that the compensation be ascertained in a suit of the usual form or in one of the State's regular courts forming a part of its judicial system. The proceeding for ascertaining such compensation may be in any form and in a special statutory tribunal created for that sole purpose, provided that the tribunal be fair and impartial, and the proceeding be judicial in character and reasonably calculated to do justice as administered in courts of general jurisdiction.

C. B. & I. R. R. v. *Chicago,* 166 U. S. 226.

Long Island Water Supply Co. v. *Brooklyn*, 166 U. S. 685, 695.
Bauman v. *Ross*, 167 U. S. 548, 592-593.
Backus v. *Fort Street Depot Co.*, 169 U. S. 557, 569.
Railroad Co. v. *Railroad Co.*, 28 Kans. 453.
Railroad Co. v. *Long*, 69 Conn. 424.
2 Lewis on Em. Dom. (2nd. Ed.) Sec. 365.
Cooley's Const. Lim. (6th Ed.) pp. 694-695.

The proceeding provided for by the drainage law of Kansas, without any provision for an appeal from the award of the commissioners, would have complied with the constitutional requirements as to due process of law. The provision made for appeal was wholly unnecessary. The award of the commissioners could have been made final. *Ibid.* In Kansas at one time the award of the commissioners in railroad condemnation proceedings was made final by statute, afterwards the statute was modified so as to provide for an appeal like the appeal provided for in the drainage law, and in 1882 Mr. Justice Brewer, then a member of the Supreme Court of that state, said in *Railroad Company* v. *Railroad Company*, 28 Kans. 453, that the statute prior to its modification was valid, and that the modification was unnecessary.

The appeal provided for by the drainage law, therefore, is a mere act of grace, and could be taken away tomorrow by the Legislature of Kansas without affecting the validity of the proceeding involved herein, begun by the drainage district and removed by appellant to the Circuit Court. Appellant has no vested right in said appeal, and legally could not complain if deprived of it by legislative enactment at this time.

If the proceeding prior to the appeal, had the law made it final, would have been due process of law, then it is a civil suit prior to the appeal, if it would have been a civil suit had no appeal been allowed by the law. The right of appeal does not alter the nature of the proceeding prior to appeal.

In *In re* Stutsman County, 88 Fed. Rep. 337, 341, Judge Amidon said:

> "A judgment which conclusively determines a right or obligation, so that the same matter cannot be litigated further, except by writ of error or appeal, is an exercise of judicial power," * * *

In the Traction Company Case, and in *Searl* v. *School District,* 124 U. S. 197, this court held the proceedings to be civil suits before appeal, and as such removable.

If no appeal had been allowed by the law, the proceeding would have been a civil suit. For these reasons: As hereinbefore stated, the proceeding without the appeal would have satisfied the constitutional requirement of due process of law, and, therefore, in the meaning of the constitutional provisions, would have been in a fair and impartial tribunal, and would have constituted a judicial proceeding reasonably calculated to do justice as administered in courts of general jurisdiction. And, therefore, the proceeding would have possessed the essential features of a civil suit, and would have been such a suit within the meaning of the Judiciary Act.

In *In re Stutsman County,* 88 Fed. Rep. 337, 340, Judge Amidon said:

> "It is difficult to appreciate the force of that reasoning which attaches to a proceeding in court, as to its effect upon the rights of parties, all the consequences of a suit, but, for the purpose of determining the jurisdiction of the Federal Courts, holds the same proceeding to be purely administrative."

In Cooley's Constitutional Limitations *supra* such proceedings as the one provided for by the drainage law would have been without an appeal, are said to be judicial in character (Const. Lim. *supra,* pp. 694-695).

In Connecticut the award of the condemnation commissioners is final, but Chief Justice Andrews in *Railroad* v. *Long,* 69 Conn. l. c., 437, says that the proceeding "is a suit at law."

In *Mineral Range R. R.* v. *Copper Co.,* 25 Fed. Rep. 515, 518, Mr. Justice Brown, when District Judge, held a proceeding substantially the same as the proceeding here would be without the right of appeal to be a civil suit and as such removable. He said that the omission of the right to appeal did not prevent the proceeding from being removable. His words were:

> "But does the failure of the statute to provide for an appeal from the award of the commissioners to the Circuit Court, and the framing of an issue there deprive the case of its removable character? We think not."

This case was approved by this court in both the Searl and Traction Company Cases.

If the ascertainment of the compensation to be paid for the land is not an administrative but a judicial act, the nature of the proceeding under the drainage law is precisely the same whether it precedes or follows the taking of possession of the land by the drainage district. Would any one say that such a proceeding for ascertaining the compensation to be paid after possession taken would not be a civil suit? Certainly not.

Moreover, the nature of the proceeding is the same whether the judicial ascertainment and payment of compensation before the taking of possession be required merely by statute or by statute enacted in pursuance of constitutional requirement. Is it possible that such a proceeding can satisfy a constitutional requirement that compensation be judicially ascertained, and not be a suit cognizable in the United States courts? And if such a proceeding be a civil suit when such suit is required by the constitution, then the same proceeding is a civil suit when it is required by statute although no constitutional requirement impelled the enactment of the statute.

The proceeding under the drainage law is either removable immediately when begun or it is not removable at all, at any time. The learned United States Circuit Court of Appeals erred in holding that the proceeding, though not removable before appeal, becomes removable after appeal. No proceeding is removable unless it could have been instituted in the United States Circuit Court (*Tennessee* v. *Union Planters' Bank*, 152 U. S. 454; *Mexican Natl. R. R.* v. *Davidson*, 157 U. S. 201; *Metcalf* v. *Watertown*, 128 U. S. 586; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48; *Traction Company* v. *Mining Co.*, 196 U. S. 239, 246), and therefore, for a proceeding to be removable, it must be removable as soon as the first step in it is taken. Consequently, the proceeding under the drainage law cannot be non-removable before appeal but removable after appeal unless the appeal constitutes a suit then initiated, and unless such suit can be begun in the United States Circuit Court, that is to say, unless the appeal can be taken directly to that court from the award of the commissioners. Will any one contend that such appeal can be taken from the award filed in the office of the county clerk?

This ruling of the United Circuit Court of Appeals was based upon certain expressions in the opinions of this court in *Boom Co.*

v. *Patterson*, 98 U. S. 403, and Pacific Railroad Removal Cases, 115 U. S. 1, referred to and not disapproved by the court in the Searl Case. Both the Boom Company and Removal Cases arose and were decided under the Judiciary Act of 1875, and are not applicable under the Judiciary Act of 1887, 1888. Moreover, the expressions of the court in the cases mentioned are not of controlling authority. The first expression occurred in the Boom Company Case. The removal in that case was taken after appeal. No objection was made or considered by the court that the removal was too late; the question passed upon was whether the proceeding was properly removed. The court held the removal proper. That disposed of the question, but Mr. Justice Field, who wrote the opinion of the court, stated that the proceeding anterior to the appeal could not have been removed for the reason that the proceeding before the commissioners "to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms." This statement was wholly unnecessary to the decision of the case and was the mere *dictum* of the writer of the opinion. In the Removal Cases, the removal was taken after the appeal and the objection was made that the removal came too late, and should have been taken before the appeal. The court disposed of the objection on the authority of the *dictum* in the Boom Company Case. But later, in the Searl Case the removal was taken before the appeal, and the court sustained the removal, disposing of the *dictum* in the Boom Company Case and the decision in the Removal Cases by distinguishing the Searl Case from those cases. In the Traction Company Case the court held the removal proper prior to the appeal, without saying whether the removal could also have been taken after the appeal as well as prior thereto. So that it is clear that anything that may have been previously said indicating that the removal of such proceedings cannot be had prior to the appeal must be deemed to have been withdrawn by the court. Furthermore, how about the removal of such a proceeding where no appeal is allowed? Can the removal be prevented by not allowing an appeal?

The appeal by the landowner, under the drainage law, involves nothing but the question as to the amount of compensation. The appeal does not affect the right of the drainage district to take possession of the land. The drainage district may pay the amount of the award of the commissioners to the County Treasurer at once,

and thereupon it becomes invested with the right to the immediate possession and the perpetual use of the land (sec. 3042). The award of the commissioners, therefore, is final so far as concerns the right of the drainage district to the possession and use of the land forever. An increase, on appeal to the District Court, in the amount of compensation awarded by the commissioners would not affect the right of the drainage district to the possession and use of the land. The proceeding anterior to appeal, therefore, is not a mere administrative proceeding without effect upon the rights of the parties, and preliminary to a proceeding in court wherein those rights will be adjudged. Were it such a proceeding the drainage district could ignore it altogether and in the first instance institute the proceeding in court. *Chicot* v. *Sherwood,* 148 U. S. 529, 532, 533. But the essential part of this proceeding is that part anterior to the appeal. In it the rights of the parties are finally determined. It is the appeal that is unnecessary and might be abrogated.

No other case than the case at bar can be found wherein the court decided that a removal actually taken in such a proceeding prior to appeal was premature and could have been taken subsequently to the appeal. In a number of other cases removals taken as soon as the proceedings were instituted have been sustained.

COLORADO:

Colorado, etc., R. R. v. *Jones,* 29 Fed. Rep. 193 (Mr. Justice Brewer, then Circuit Judge).

KANSAS:

Leavenworth, etc., R. R. v. *U. P. R.* 29 Fed. Rep. 728 (Mr. Justice Brewer, then Circuit Judge).

MASSACHUSETTS:

Banigan v. *Westchester,* 30 Fed. Rep. 393.

MICHIGAN:

Mineral, etc., R. R. v. *Copper Co.,* 25 Fed. Rep. 515 (Mr. Justice Brown, then District Judge).

MISSOURI:

Kansas City, etc., R. R. v. *Lumber Co.,* 36 Fed. Rep. 9 (Judge Philips), 37 Fed. Rep. 3 (Mr. Justice Brewer, then Circuit Judge).

Union Terminal Ry. Co. v. *Burlington Ry. Co.,* 119 Fed. Rep. 209.

NORTH CAROLINA:

North Carolina Postal Telegraph Co. v. *R. R. Co.,* 88 Fed. Rep. 803.

The conclusion reached by the United States Circuit Court of Appeals that the proceeding in the case at bar was not removable when removed was based (it is said with the utmost respect for the learned judges who decided the case) upon a total misconception of the principles involved. This clearly appears from the court's opinion written by Judge Munger. That opinion clearly shows that the court was unable to see that the act of the State, under the drainage law, appropriating land through the order of a drainage district, is entirely separate and distinct from the proceeding instituted by the drainage district for ascertaining the compensation to be paid for the land before possession thereof can be taken. The court considered and treated the two separate and distinct proceedings as one, and it a proceeding by the State in the exercise of its power of eminent domain for the taking of the land, and could not see that the proceeding for ascertaining the compensation is a limitation imposed by the State itself upon the exercise of said power, not limiting the power of *selection and appropriation* of property but simply requiring the ascertainment and payment of compensation to be made after the selection and appropriation of the property should have been made, but before possession of it should be taken. And yet the court held that such a proceeding, *if in the form of a civil action in a regular court*, a part of the judicial system of the State, would be a civil suit from its inception. The court relied for this ruling upon the Traction Company Case!

The court also attached considerable importance to those provisions of the drainage law in relation to the presentation of the application for the appointment of commissioners to the judge of the State Court instead of to the court; to the filing of the appointment of the commissioners together with said application for their appointment with the Register of Deeds instead of with the clerk of the court; to the filing of the report of the commissioners with the County Clerk instead of with the clerk of the court, and to other provisions of like nature. Upon that point Judge Munger said:

> "In this case, involving a consideration of the Kansas statute, we are unable to perceive upon what theory it can be said that the proceeding anterior to the appeal was a civil action, which could have been instituted in the Federal Court. The petition for the appointment of commissioners is not required to be presented to a court. It is to be presented to the Judge of the District or Common Pleas Court, and then,

with his order appointing commissioners, filed not in court but with the Register of Deeds. The Legislature might have designated that the petition should be presented and commissioners named by any executive officer of the state or county. The designation of the judge was merely a description of the person or official who was to act upon the petition in the first instance. The report of the commissioners was not filed in any court but was to be filed with the county clerk. No exceptions to the report of the commissioners could be made or heard. No proceedings in court were had until an appeal should be taken from the award of the Commissioners. When such appeal was taken and lodged in the District Court a civil action was for the first time pending."

The court totally misconceived the Traction Company Case. In that case this court did not hold that the appropriation of land by the State ever is or can be a judicial act, or anything but an exercise by the State of its sovereign power of eminent domain. But this court held that where the State requires as a condition precedent to the taking of possession of the land appropriated, that the value of the land be ascertained in a judicial proceeding and paid, then said proceeding is a civil suit, and not a part of the appropriation of the land. Mr. Justice Holmes contended that the ascertainment and payment of compensation, however the compensation might be ascertained and whether in a court or not, was a part of the appropriation of the land and could not be regarded as judicial any more than could be the selection and appropriation of the land. But the court did not concede the correctness of this contention of Mr. Justice Holmes; on the contrary, it maintained the position that the act of appropriation is entirely separate and distinct from the judicial ascertainment of compensation. The State's right to appropriate the land is conceded, and does not have to be adjudged by a court, but the State's right to take possession of the land is postponed until after judicial ascertainment of compensation shall have been had. While it is true that Mr. Justice Harlan laid emphasis on the fact that the proceeding for ascertaining compensation in the case before him was had in a court which was a part of the judicial system of the State, that was done for the purpose of strengthening the court's position that the proceeding was judicial and was a civil suit, and not for the purpose of intimating that were a State in fact to cause private land desired by it for public use to be selected and appropriated by means of a proceeding in court, *such* proceeding would be a civil suit or even

judicial in character. Mr. Justice Holmes very properly pointed out that that the fact emphasized by Mr. Justice Harlan had no bearing upon the difference between himself and the court, and that the nature of a proceeding, *i. e.*, whether administrative or judicial does not depend upon where it is had or upon the form it takes, but rather upon its inherent qualities.

To illustrate, had the law of Kentucky, in which state the proceeding in the Traction Company case originated, provided that any corporation entitled to condemn land should apply to the County Court for an order setting apart, assigning or appropriating the land desired by it for its use, and that, thereupon, and before the corporation should be entitled to take possession of the land, compensation for the land should be ascertained in said court in just such a proceeding as that which was provided for by the law of Kentucky as written, no member of this court would have held that the proceeding up to the order of the court appropriating the land, *i. e.*, "assigning or setting it apart" (Webster's Dictionary) for the use of the drainage district, was a civil suit or even judicial in character, although, doubtless, all of them would then have agreed that the subsequent proceeding for ascertaining compensation was a civil suit. In the case supposed the line separating the two proceedings would, perhaps, have been clearer than it was in the law as written, although such line of separation was sufficiently clear in the law as actually written. As written, the law provided that the corporation seeking to take the land should file in the office of the clerk of the County Court a description of the land sought to be taken by it. The effect of the law was to appropriate the land (if it was such as the corporation was entitled to take) upon the filing of a proper description, but possession was not to be taken until ascertainment of compensation in the mode prescribed and its payment. The appropriation was made by the filing of the description. The appropriation however, was conditional and did not become effective until performance of the condition. It was as if the condition had been written at large in the paper containing the description, and made a part of it.

The Act of Congress incorporating a bridge company (26 Stat. at L. 269, 270), hereinafter spoken of at more length upon another point, actually did provide that the application for the "condemnation or appropriation of property" should be made to the United States Circuit Court, and that an order should be made by the court appropriating the property. The Act also provided that

compensation should be ascertained and paid before possession should be taken of the property. No difficulty was experienced in separating the two acts, or in holding the proceeding for the ascertainment of compensation to be a civil suit. *Luxton* v. *Bridge Co.* 147 U. S. 337.

The difference between the appropriation of the land and the ascertainment of the compensation, and the separation of the one from the other, is made clear by the following extract from an opinion of Chief Justice Andrews in *Railroad Company* v. *Long,* 69 Conn. 424:

> "Unlike the adjudication of the necessity and the extent of the taking. the whole process by which the compensation is ascertained is judicial. The legislature may determine what private property is needed for public purposes (that is a question of political and legislative character); *but when the taking has been ordered,* then the question of compensation is judicial. The landowner is not entitled, as a matter of right, to a jury trial, because the constitution has not so required; but he is entitled to have an impartial tribunal, *with the usual rights and privileges which attend judicial investigations. It is a suit at law. Searl* v. *School Dist.,* 124 U. S. 197, 8 Sup. Ct. 460. Under our practice, the application to the judge to appoint the appraisers is the first step in the judicial process. And, as we have indicated, it was necessary for the judge to pass upon the questions presented in the statute and alleged in the application, before he had jurisdiction to appoint the appraisers. The power to appoint implies the power to pass upon and decide the jurisdictional facts."

Mr. Justice Brown, then Circuit Judge, unquestionably intended to point out this difference in *Mineral Range Railroad* v. *Copper Co.,* 25 Fed. Rep. 515, 520, when, in speaking of a contention made by counsel, he said:

> "But we think that, in this particular, counsel overlook the distinction between the *power* to condemn, which confessedly resides in the state, and *proceedings* to condemn, which the state has delegated to its courts."

The proceeding to ascertain the compensation to be paid is commonly called by courts and text writers a proceeding to condemn, and it is entirely clear that Mr. Justice Brown used the latter term in the sense of the former, and that he intended to say that the State selects the property and orders it to be taken in the exercise of its power of eminent domain, and that the compensation to be paid is ascertained in the courts.

This remark of Mr. Justice Brown's was quoted and approved in the Traction Company Case (196 U. S., 250).

In *Colorado Midland Ry. Co.* v. *Jones et al.*, 29 Fed. Rep. 193, Mr. Justice Brewer, then Circuit Judge, pointed out this same distinction between the appropriation of the property and the ascertainment of compensation. He remarked:

> "and, when the right to take is asserted and adjudged, the compensation, *a matter entirely independent of the right*, still remains for determination."

The United States Circuit Court of Appeals was also mistaken in its position that the proceeding under the drainage law prior to the appeal is not in a court, but is before an administrative body. The judge appoints the commissioners and the commissioners constitute a special statutory tribunal for a specific purpose. A proceeding in such a tribunal may be a civil suit as well as if in a court of record of general jurisdiction belonging to the judicial system of the state. In *Gaines* v. *Fuentes*, 92 U. S. 10, 19, it was held that the right of removal does not depend upon the character of the State court in which the suit is instituted, that it is immaterial whether that court be one of limited or general jurisdiction, and that the test of removability is in the character of the controversy, the amount involved, and the diversity of citizenship. In *Chicot County* v. *Sherwood*, 148 U. S., l. c. 532, this case was cited in support of the original jurisdiction of the United States Circuit Court of a suit against a county of Arkansas notwithstanding the novel and strange procedure existing in that State for proving up claims against counties. In the Chicot Case the court quoted much of and approved the following excerpt from the Gaines Case:

> "There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if by the law of the State, customary or statutory, they can be maintained in a State court, whatever designation that court may bear, we think they may be maintained by original process in a Federal Court, where the parties are one side citizens of Louisiana, and, on the other, citizens of other states."

The courts of justices of the peace are special statutory courts, they are courts of limited jurisdiction, and they are not courts of record. And yet it has been held that suits in those courts

are removable. *State* v. *Post*, 3 Fed., Rep. 117; *State* v. *Bolton*, 11 Fed., Rep. 217; *State* v. *Kirkpatrick*, 42 Fed., Rep. 689; *Katz* v. *Herschel Mfg. Co.*, 150 Fed. Rep. 684. Commissioners under the drainage law (appointed in a proper spirit) are certainly of equal dignity with justices of the peace.

The United States Circuit Court of Appeals attached undue importance to the mere form of the proceedings under the drainage law. This court has never attached importance to the mere form of proceedings, and in the Traction Company Case all the members of the court agreed that form was not of essential importance, and the dissent was not on the ground of form at all. Mr. Justice Harlan quoted approvingly from the opinion of Mr. Justice Brewer in *Colorado, etc. R. R. Co.* v. *Jones*, 29 Fed., Rep. 193. The quotation did not include quite all that Mr. Justice Brewer said upon the point. The complete excerpt from the latter's opinion is as follows (the part thereof omitted by Mr. Justice Harlan is indicated by brackets):

> "I do not suppose that a state can, by making special provisions for the trial of any particular controversy, prevent the exercise of the right of removal. If there was no statutory limitation, the legislature could provide for the trial of many cases by less than a common-law jury, or in some other special way. But the fact that it had made such different and special provisions would not make the proceeding any less a trial, or such a suit as, if between citizens of two states, could not be removed to the federal courts. If this were possible, then the only thing the legislature of a state would have to do to destroy the right of removal entirely would be to simply change and modify the details of procedure. (Courts have always looked beyond the mere form—tried to go down to the substance; and if it is apparent that there is a controversy between citizens of two states, involving a mere question of money, they will hold that there is a removable suit; and no mere matter of detail in procedure established by the legislature can abridge that right to remove)."

And Mr. Justice Harlan stated the court's position to be that a state cannot adopt any mode for ascertaining the compensation to be paid to a property owner for his property as a condition precedent to the taking possession of it for public use which would exclude the proceeding from the Circuit Court of the United States, the other jurisdictional facts existing. He said that a proceeding for ascertaining such compensation, diversity of citizenship existing, "in its essential features is a suit involving a controversy between

citizens of different states" (196 U. S. bottom of page 252), and that "A state cannot by any statutory provisions withdraw from the cognizance of the Federal courts a suit or judicial proceeding in which there is such a controversy. Otherwise the Constitution in extending the judicial power of the United States would thereby be defeated" (196 U. S. 253).

The details of the drainage law in relation to the places for filing the application for appointment of commissioners, the appointment of the commissioners, and the reports by them, cannot deprive the Circuit Court of the United States of jurisdiction of the proceeding for the ascertainment of compensation, if otherwise it is of such character as to be within such jurisdiction. If the jurisdiction of Federal courts could thus be destroyed by strange and fantastic provisions of the State Codes, there would soon be left no jurisdiction in said courts.

Those peculiarities of the drainage law would cause no difficulty in the original institution and prosecution of the proceeding in the United States Circuit Court. The latter court would not have to follow literally the provisions of the drainage law, but only as near as could be in harmony with the legislation of Congress (*Luxton* v. *Bridge Co.*, 147 U. S. 337, 338; *United States* v. *Engerman et al.*, 45 Fed., Rep. 546; *In re Secretary of the Treasury*, 45 Fed., Rep. 396).

In *Luxton* v. *Bridge Company, supra,* (of which something has been said hereinbefore on another point), it appears that a bridge company was incorporated by an Act of Congress for the purpose of constructing a bridge between the States of New Jersey and New York, and the Act provided, among other things, that compensation for property condemned under the Act should "be ascertained according to the laws of that state within which the same is located." All proceedings for the condemnation of property were to be in the United States Circuit Court for the district where the property was located (26 Stat. at L. 269, 270). The bridge company sought to condemn some property in New Jersey, whose law required that an application for the appointment of commissioners should be presented to a justice of the *Supreme Court;* that the report of the commissioners should be filed with the *County Clerk;* and that either party might appeal from the award of the commissioners to the *Circuit Court* of the county, in which latter court there should be a trial by jury. This court refused to

permit the peculiar provisions of the New Jersey law to defeat the jurisdiction of the United States Circuit Court, and held that the provision of the special Act of Congress that the proceedings should be according to the laws of the State where the property was located "must like the corresponding direction as to practice, pleading and procedure in Section 914 of the Revised Statutes, give way whenever to adopt the State practice would be inconsistent with the terms, defeat the purpose, or impair the effect of any legislation of Congress" (147 U. S., 338). Mr. Justice Gray wrote the opinion of the court. He further said:

> "The award of the commissioners so appointed, must be filed and recorded somewhere, in order to preserve the proof of the rights of both parties under it. To infer that it should be filed and recorded in the office of the clerk of the county in which the land lies would be most incongruous for that would either subject an award of commissioners appointed by a court of the United States to appeal and review in a court of the state; or else require an award recorded in the clerk's office of a court of the state to be reviewed in the Circuit Court of the United States. The provisions of the statute of the State in this particular being inapplicable and the Act of Congress containing no special direction on the subject, the only reasonable conclusion is that the report of the commissioners appointed by the Circuit Court of the United States, must be returned to the court which appointed them, be made matter of record therein and be subject to be confirmed or set aside by that court. *Boston & Worcester Railroad* v. *Western Railroad,* 14 Gray, 253, 258. And if a trial by jury should be had, by way of appeal from the assessment of the commissioners, it must likewise be in the same court. The case throughout from the application of the corporation for the appointment of commissioners to assess damages to the owner of the land proposed to be taken, until judgment upon the award of the commissioners or upon the verdict of a jury, assessing those damages, remains in the Circuit Court of the United States and under its supervision and control" (147 U. S. 340-341).

The incongruities in the drainage law are no greater than were those that existed in the New Jersey law. And recurring for a moment to the matter of appeal, there would be greater incongruity in appealing from an award of commissioners filed with the County Clerk to the United States Circuit Court, than for the proceeding to be instituted in the first place, and prosecuted to a completion in that court.

The fact that the drainage law requires the application for the appointment of commissioners to be presented to a judge of the court instead of to the court itself is unimportant. In many instances the judge is treated and regarded as the court itself and performs its functions. This is true universally, and in Kansas as well as elsewhere. The Constitution of Kansas (art. 4, sec. 16) provides:

> "The several justices and judges of the courts of record in this state shall have such jurisdiction at chambers as may be provided by law."

It has been held in Kansas that a judge of the District Court, if authorized by statute, has the power to issue injunctions at chambers (*State* v. *Cutler*, 13 Kans. 131); that appeals may be taken from the orders and decisions of said judges at chambers, and that exceptions thereto may be preserved for purposes of appeal (*State* v. *Burrows*, 33 Kans. 10); and that judges at chambers can punish for contempt (*In re Willington*, 24 Kans. 214).

It is not unusual for State statutes to provide that applications for the appointment of commissioners shall be made to the judge of a court instead of to a court. This is the common practice in Kansas. A judge of a court is selected, doubtless, for the reason that he is possessed of judicial power and is deemed capable of wisely exercising it, and the application necessarily always requires the exercise of judicial power and discretion. It is the judge's duty to, and he must decide whether the conditions precedent to the appointment of the commissioners (as in this case whether the necessity for the land has been determined in the manner required by the drainage law and appropriated by proper order by the drainage district) have been complied with, before he has jurisdiction to appoint the commissioners (*Railroad Co.* v. *Long*, 69 Conn. 424), and in selecting the commissioners to appoint, he exercises judicial discretion of a high character on account of the great powers possessed by the commissioners (*R. R. Co.* v. *R. R. Co.*, 29 Fed. Rep. 728, 731). In this last case, although the statute did not require notice of the application for appointment of commissioners, Mr. Justice Brewer, then Circuit Judge, after the removal of the case, sustained a motion to vacate the appointment of commissioners made by the State court without notice, on the ground that the proceeding was judicial, and notice ought to have been given, especially in view of the great powers of the commissioners. All these questions a non-resident landowner by timely and proper ap-

plication for removal can have passed upon by the judge of the Federal Court (Traction Company Case, 196 U. S. 254).

The drainage district could have made its application for the appointment of commissioners to a judge of the United States Circuit Court for Kansas. That court, for such purpose, would have been one of the State courts designated in the drainage law, and its judge a judge of one of such State courts (Traction Company Case, 196 U. S. 255). The application for the appointment and the appointment of commissioners would have been filed with the clerk of the United States Circuit Court, and so would have been the report of the commissioners; and the amount of the award would have been paid into that court. There would have been no difficulty about it. Such was the course pursued in *Kansas City* v. *Metropolitan Water Company,* 164 Fed. Rep. 728 (a removed case), to which further reference hereinafter will be made shortly.

Even prior to the Traction Company Case it was not unusual for such proceedings to be instituted in Federal courts. This will appear from the following cases (probably there are others):

COLORADO:

R. R. Co. v. *R. R. Co.,* 41 Fed. Rep. 203.
R. R. Co. v. *R. R. Co.,* (three cases), 34 Fed. Rep. 386.

ILLINOIS:

St. Louis etc., R. R. Co. v. *Thomas,* 37 Fed. Rep. 839.

NEVADA:

Douglass v. *Burns,* 59 Fed. Rep. 29; 63 Fed. Rep. 16.

NORTH CAROLINA:

Postal Tel. Co. v. *R. R. Co.,* 90 Fed. Rep. 80.

After the Traction Company Case was decided, the decision of the United States Circuit Court of Appeals in the case at bar is the only decision that has been made holding that such a proceeding was not removable. In all other cases it has been held uniformly that all proceedings for the ascertainment of compensation to be paid for property ordered to be taken for public use—possession not to be taken until compensation ascertained and paid—are civil suits.

Certain cities of Kansas are empowered to condemn and take water plants for their own use. The provisions of the law, in all substantial respects, are the same as the provisions of the drainage law. A city is authorized by ordinance to order the appropriation

of the water plant, but before taking possession of the plant the city must cause compensation to be ascertained and paid substantially as is done by drainage districts. Kansas City, Kansas, sought to condemn the waterworks of this very appellant under said law; it ordered the appropriation of the plant, and then presented to the judge of the State District Court its application for the appointment of commissioners to ascertain the compensation to be paid to this complainant. Immediately, and before the appointment was made, the proceeding was removed to the United States Circuit Court. The removal was disregarded by the State judge (who appointed commissioners) and by the officers of the City, and an injunction was procured from the Circuit Court, as here, in aid of the court's jurisdiction of the removed case (*Metropolitan Water Co.* v. *Kansas City et al.*, 164 Fed. Rep. 738). A motion to remand the removed case was filed and overruled (*Kansas City* v. *Metropolitan Water Company*, 164 U. S. 728). Judge Pollock (one time a judge of the Supreme Court of Kansas, and thoroughly acquainted with Kansas statutes and practice) sat as judge in these cases. He appointed commissioners and they assessed the value of the waterworks. His opinions show that he based his action upon the Traction Company Case.

In *South Dakota Ry. Co.* v. *R. R. Co.*, 141 Fed. Rep. 578, the United States Circuit Court of Appeals for the Eighth Circuit (different judges sitting from those who sat in the case at bar; the latter were Judges Hook, Adams, and Munger—Judge Munger wrote the opinion; the former were Judges Sanborn, Phillips, and Riner—the latter wrote the opinion), in its opinion written by Judge Riner, held that the proceeding for ascertaining compensation under the condemnation law of South Dakota was a civil suit, and, as such removable.

In *Helena Power Company*, v. *Spratt et al.*, 146 Fed. Rep. 310, a like ruling was made as to the proceedings under a statute of Montana.

In *Kansas City* v. *Hannegan et al.*, 146 Fed. Rep. 249, it was held that the proceeding under the charter of Kansas City "so far partakes of the character of a suit at law as to render it removable * * * when the conditions exist authorizing a removal."

In *Deepwater Ry. Co.* v. *Coal & Lumber Co.*, 152 Fed. Rep. 824, the court said:

> "The jurisdiction of Federal courts to try and determine controversies touching the condemnation of land, either by original proceeding or upon removal from State courts, is now so well settled as to admit of no further argument."

The jurisdiction of the United States Circuit Courts is the same in all the states. They all possess the same powers. A case removable in one state must be removable in all other states. Therefore, if a proceeding for ascertaining compensation for land designated and appropriated, before possession taken, can be and is a civil suit in any state, it is a civil suit in all the states.

It goes without saying that if the proceeding under the drainage law anterior to appeal is a civil suit, it is such suit from the presentation to the judge of the application for the appointment of commissioners, and that immediately upon such presentation to the State judge the proceeding is removable to the United States Circuit Court. As said by Chief Justice Andrews in *Railroad Co.* v. *Long*, 69 Conn. 424, "the application to the judge to appoint the appraisers is the *first* step in the judicial process," and as said by Mr. Justice Matthews in the Searl Case "that appointment of commissioners is a step in the suit" (124 U. S. 200).

The proceeding involved herein was removable as soon as begun.

II.

If the condemnation proceeding was a suit of a civil nature within the meaning of the Federal Judiciary Act, there is no doubt about the controversy being separable as to each of the landowners.

The controversy was clearly separable.

So. Dak. Ry. Co. v. *Ry. Co.*, 141 Fed. Rep. 578.
Pac. Removal Cases, 115 U. S. 1, 18-22.
Sugar Creek R. Co. v. *McKell*, 75 Fed. Rep. 34.
Northern P. Term. Co. v. *Lowenberg*, 9 Sawy. 348.
Black's Dill. on Removal, Sec. 148.

Some courts hold that in such a proceeding the controversy is not only separable, but also separate as to each land owner so that the removal as to one does not remove the entire proceeding, but only the proceeding so far as it affects the removing party.

Deepwater Ry. Co. v. *Ry. Co.*, 152 Fed. Rep. 824.
Chicago v. *Hutchinson*, 15 Fed. Rep. 129.

There is no controversy about this or any other jurisdictional fact.

III.

The Circuit Court had jurisdiction to grant the relief prayed for in the bill of complaint.

If the condemnation proceeding was legally removed to the United States Circuit Court, that court obtained and the State court lost jurisdiction of the proceeding, and the United States Circuit Court had jurisdiction and it was its duty to protect its jurisdiction in the removed case by enjoining the drainage district, from prosecuting the proceeding before the condemnation commissioners wrongfully appointed by the State judge after the removal, and by enjoining said commissioners from taking any further action under said appointment, insofar as related to complainant's land, as prayed in the bill.

Traction Company Case, 196 U. S. 256.

After a case has been legally removed from a State to a Federal court, the party removing should not be harassed by the prosecution of the case in the State court.

Respectfully submitted,

WILLARD P. HALL,
Attorney for Appellant.

APPENDIX.

Sections of General Drainage Law of Kansas specifically mentioned in foregoing brief, as found in Dassler's General Statutes of Kansas, 1909.

"SECTION 3038. *Proceeding When Railroad Entitled to Compensation.* Sec. 71.—That whenever it shall be deemed necessary to construct any levee across the right of way of any railroad company, and such railroad company shall be entitled to compensation therefor, the board of directors shall have the power to make such crossing or to condemn and appropriate so much of such right of way or land as may be necessary for that purpose in the manner hereinafter provided and whenever it shall be deemed necessary to appropriate any private property for use by the district in widening, deepening or otherwise improving any natural water course to prevent the overflow thereof, or for the construction of any levee, canal, drain, or other work, the board of directors shall cause a survey and description of the land so required out of the right of way or lands of such railroad company or out of the lands of any private owner to be made by some competent engineer and filed with its secretary, and thereupon shall make an order declaring that the appropriation of such land is necessary and setting forth for what purpose the same is to be used. The board of directors, as soon as practicable thereafter, shall present a written application to the judge of the District Court or of the Court of Common Pleas of the county in which said land is situated, describing the land sought to be taken and setting forth that the appropriation thereof is necessary for the use of the district, and praying for the appointment of three commissioners to make appraisement and assessment of damages therefor. Upon the presentation of such petition by such board of directors or its attorneys, the judge to whom the same is presented shall forthwith appoint such commissioners. Such appointment shall be made in writing, under the hand of the judge, and delivered to the said board of directors or its attorney, who shall without delay cause such application and certificate of appointment to be recorded in the office of the register of deeds of the proper county, and in case any person so appointed refuses or fails to serve as such commissioner for any reason, the said judge, upon application, shall appoint some other person having the proper qualifications to fill such vacancy. Such commissioners shall be sworn to honestly and faithfully discharge their duties as such commissioners (*Id.* Sec. 39).

SECTION 3039. *Notice to Railroad; Proceeding.* Sec. 72.—The commissioners appointed under the next preceding section shall give any railroad company or other owners of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, by one publication in some newspaper published in such county, and at the time fixed by such notice shall upon actual review appraise the value of the lands taken and assess the other damages done to the owners of the property respectively by such appropriation. The said commissioners may adjourn as often and for such length of time as may be deemed convenient, and may during any adjournment perfect or correct all errors or omissions in the giving of notice by serving new notices or making new publication, citing corporations or individual property owners who have not been notified or to whom defective or insufficient notice has been given, and notice of any adjourned meeting shall be as effective as notice of the first meeting of the commissioners; and the commissioners may from time to time make partial reports, and upon completing their duties shall make a final report. All reports shall be in writing and filed in the office of the clerk of such county. Notice to any railroad company or other corporation may be served upon any officer or agent thereof or upon any other owner, if found within the district, in lieu of such notice by publication. (*Id.* Sec. 40).

SECTION 3040. *Commissioner's Report.* Sec. 73.—That said commissioners shall in their reports accurately describe the lands by them set off and appropriated, the purpose for which the same are taken, the name of each owner, if known, and shall apprise (appraise) each owner's interest and assess his damages separately, if his title can be ascertained from the public records in the office of the register of deeds and if the right to construct a levee across the route or right-of-way or other lands of any railroad or street railroad company shall be appropriated, the point where such crossing is to be made shall be distinctly specified (*Id.* Sec. 41).

SECTION 3041. *Duty of Clerk and Treasurer.* Sec. 74.—That the county clerk shall forthwith, upon any report being filed in his office, prepare and deposit a copy thereof in the office of the treasurer of such county, and if such drainage district shall cause to be paid to such treasurer the amount in full of such appraisement within ninety days of the time of filing such copy in such treasurer's office, such treasurer shall thereupon certify such fact upon the copy of the report, under his hand and seal of office, and shall upon demand of the persons severally entitled thereto, pay over the amounts of

such fund to such persons as shall be respectively entitled thereto (*Id.*, Sec. 42).

SECTION 3042. *Report Filed; Right Perpetual.* Sec. 75.—That if such drainage district shall cause the copy of the report so certified to be within ten days after such certifying filed and recorded in the office of the register of deeds of such county, the right to the perpetual use of all lands shown by such report to have been appropriated shall vest in such district for the purpose for which the same were condemned and taken as stated in such report, and said district shall have the right forthwith to construct a levee across the right-of-way of any railroad or street railroad company at the point specified in such report, and to occupy all other lands which by the terms of said report were by said commissioners set off and appropriated for its use and benefit (*Id.*, Sec. 43).

SECTION 3043. *Appeal from Award.* Sec. 76.—That any person being or claiming to be the owner of any land so condemned or appropriated, and deeming himself aggrieved by the decision or award of said commissioners, may appeal from their award as to the value of the land, crops, buildings and other improvements thereon, and for all other damages sustained by such person by reason of the appropriation of such lands, in the same manner as appeals are granted from the judgment of a justice of the peace to the District Court, but said appeal and all subsequent proceedings shall only affect the amount of compensation to be allowed and shall not delay the prosecution of the work by such district, upon its paying or depositing the amount so assessed by said commissioners with the county treasurer of the county within which the said lands are situated, and upon the payment or deposit as aforesaid of the money so assessed by said commissioners; and upon said district executing a bond with sufficient surety, to be approved by the county clerk, to pay all damages and costs which said district may be adjudged to pay by said District Court, said district may, notwithstanding such appeal, take possession of, appropriate and use said land for the purposes for which it was so condemned (*Id.*, Sec. 44).

SECTION 3044. *District May Appeal.* Sec. 77.—That if any district shall deem itself aggrieved by any appraisement, assessment or damages or award by said commissioners made to any owner of (or) claimant of land sought to be appropriated, it may appeal therefrom in the same manner as appeals are granted from the judgment of a justice of the peace, and in case of such appeal shall not be required to make any deposit of money with the county treasurer or have any right to occupy the land condemned pending such appeal, but upon

final judgment on such appeal said district may pay the amount awarded the land owner into court and thereupon shall have the right to occupy the land for which the award is made (*Id.*, Sec. 45).

SECTION 3045. *What Determined.* Sec. 78.—That upon the trial of any appeal it shall be competent for the district to dispute and contest the title of the appellant to the land appropriated, and to show that the land so appropriated constituted an obstruction or encroachment wrongfully placed in the channel or between the banks of such watercourse or that for any other reason the appellant is not entitled to any compensation therefor, and if it shall be found that the land so appropriated constituted an obstruction wrongfully placed in said watercourse or that for any reason the appellant is not entitled to receive any compensation or damages therefor, no compensation or damages shall be awarded, and any deposit made by the drainage district shall be forthwith refunded to it (*Id.*, Sec. 46).

SECTION 3046. *Pay of Commissioners.* Sec. 79.—That each commissioner appointed under this act shall receive for his services the sum of three dollars per day for the time actually engaged in the performance of his duties, to be paid by the district (*Id.*, Sec. 47)."

IN THE

SUPREME COURT

OF

THE UNITED STATES

OCTOBER TERM, 1911

No. 844

METROPOLITAN WATER COMPANY,
Appellant.

VS.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, GEORGE STUMPF, L. J. MASON AND AL MEBUS,
Appellees.

STATEMENT AND BRIEF FOR APPELLEES.

The facts in this case are as follows:

Under and by virtue of the statutes of the State of Kansas the Kaw Valley Drainage District was organized as an arm of the state to improve the Kansas River in Wyandotte County, by widening its channel so that it would be able to carry off all water flowing into it and prevent the adjacent territory from being flooded in times of high water.

It is a matter of general knowledge that in 1903 this river overflowed its banks, destroyed life and property, and rendered twenty thousand people homeless. It was a catastrophe of such proportions that Congress investigated and a corps of engineers were sent to the

field to make a report to Congress regarding the matter. At the outset it should be borne in mind that the Kansas River is a navigable stream and the Federal government has duly established harbor lines therefor. To aid the district in appropriating whatever property might be necessary for the widening of said channel, the Legislature provided as follows:

> "SECTION 3038. *Proceeding When Railroad Entitled to Compensation.* Sec. 71.—That whenever it shall be deemed necessary to construct any levee across the right of way of any railroad company, and such railroad company shall be entitled to compensation therefor, the board of directors shall have the power to make such crossing or to condemn and appropriate so much of such right of way as may be necessary for that purpose in the manner hereinafter provided and whenever it shall be deemed necessary to appropriate any private property for use by the district in widening, deepening or otherwise improving any natural water course to prevent the overflow thereof, or for the construction of any levee, canal, drain or other work, the board of directors shall cause a survey and description of the land so required out of the right of way or lands of such railroad company or out of the lands of any private owner to be made by some competent engineer and filed with its secretary, and thereupon shall make an order declaring that the appropriation of such land is necessary and setting forth for what purpose the same is to be used. The board of directors, as soon as practicable thereafter, shall present a written application to the judge of the District Court or of the Court of Common Pleas of the county in which said land is situated, describing the land sought to be taken and setting forth that the appropriation thereof is necessary for the use of the district, and praying for the appointment of three commissioners to make appraisement and assessment of damages therefor.

Upon the presentation of such petition by such board of directors or its attorneys, the judge to whom the same is presented shall forthwith appoint such commissioners. Such appointment shall be made in writing, under the hand of the judge, and delivered to the said board of directors or its attorney, who shall without delay cause such application and certificate of appointment to be recorded in the office of the register of deeds of the proper county, and in case any person so appointed refuses or fails to serve as such commissioner for any reason, the said judge, upon application, shall appoint some other person having the proper qualifications to fill such vacancy. Such commissioners shall be sworn to honestly and faithfully discharge their duties as such commissioners (*Id.* Sec. 39).

SECTION 3039. *Notice to Railroad; Proceeding.* Sec. 72.—The commissioners appointed under the next preceding section shall give any railroad company or other owners of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, by one publication in some newspaper published in such county, and at the time fixed by such notice shall upon actual review appraise the value of the lands taken and assess the other damages done to the owners of the property respectively by such appropriation. The said commissioners may adjourn as often and for such length of time as may be deemed convenient, and may during any adjournment perfect or correct all errors or omissions in the giving of notice by serving new notices or making new publication, citing corporations or individual property owners who have not been notified or to whom defective or insufficient notice has been given, and notice of any adjourned meeting shall be as effective as notice of the first meeting of the commissioners; and the commissioners may from time to time make partial reports, and upon completing their duties shall make

a final report. All reports shall be in writing and filed in the office of the clerk of such county. Notice to any railroad company or other corporation may be served upon any officer or agent thereof or upon any other owner, if found within the district, in lieu of such notice by publication. (*Id.* Sec. 40).

SECTION 3040. *Commissioner's Report.* Sec. 73.—That said commissioners shall in their reports accurately describe the lands by them set off and appropriated, the purpose for which the same are taken, the name of each owner, if known, and shall apprise (appraise) each owner's interest and assess his damages separately, if his title be ascertained from the public records in the office of the register of deeds and if the right to construct a levee across the route or right-of-way or other lands of any railroad or street railway company shall be appropriated, the point where such crossing is to be made shall be distinctly specified (*Id.* Sec. 41).

SECTION 3041. *Duty of Clerk and Treasurer.* Sec. 74.—That the county clerk shall forthwith, upon any report being filed in his office, prepare and deposit a copy thereof in the office of the treasurer of such county, and if such drainage district shall cause to be paid to such treasurer the amount in full of such appraisement within ninety days of the time of filing such copy in such treasurer's office, such treasurer shall thereupon certify such fact upon the copy of the report, under his hand and seal of office, and shall upon demand of the persons severally entitled thereto, pay over the amounts of such fund to such persons as shall be respectively entitled thereto (*Id.*, Sec. 42).

SECTION 3042. *Report Filed; Right Perpetual.* Sec. 75.—That if such drainage district shall cause the copy of the report so certified to be within ten days after such certifying filed and recorded in the office of the register of deeds of such county, the right to the perpetual use of all lands shown by such report to have been appropriated shall vest

in such district for the purpose for which the same were condemned and taken as stated in such report, and said district shall have the right forthwith to construct a levee across the right-of-way of any railroad or street railroad company at the point specified in such report, and to occupy all other lands which by the terms of said report were by said commissioners set off and appropriated for its use and benefit (*Id.*, Sec. 43).

SECTION 3043. *Appeal from Award.* Sec. 76.—That any person being or claiming to be the owner of any land so condemned or appropriated, and deeming himself aggrieved by the decision or award of said commissioners, may appeal from their award as to the value of the land, crops, buildings and other improvements thereon, and for all other damages sustained by such person by reason of the appropriation of such lands, in the same manner as appeals are granted from the judgment of a justice of the peace to the District Court, but said appeal and all subsequent proceedings shall only affect the amount of compensation to be allowed and shall not delay the prosecution of the work by such district, upon its paying or depositing the amount so assessed by said commissioners with the county treasurer of the county within which the said lands are situated, and upon the payment or deposit as aforesaid of the money so assessed by said commissioners; and upon said district executing a bond with sufficient surety, to be approved by the county clerk, to pay all damages and costs which said district may be adjudged to pay by said District Court, said district may, nothwithstanding such appeal, take possession of, appropriate and use said land for the purposes for which it was so condemned (*Id.*, Sec. 44).

SECTION 3044. *District May Appeal.* Sec. 77.—That if any district shall deem itself aggrieved by any appraisement, assessment or damages or award by said commissioners made to any owner of (or) claimant of land sought to be appropriated,

it may appeal thereform in the same manner as appeals are granted from the judgment of a justice of the peace, and in case of such appeal shall not be required to make any deposit of money with the county treasurer or have any right to occupy the land condemned pending such appeal, but upon final judgment on such appeal said district may pay the amount awarded the land owner into court and thereupon will have the right to occupy the land for which the award is made (*Id.*, Sec. 45).

SECTION 3045. *What Determined.* Sec. 78. —That upon the trial of any appeal it shall be competent for the district to dispute and contest the title of the appellant to the land appropriated, and to show that the land so appropriated constituted an obstruction or encroachment wrongfully placed in the channel or between the banks of such watercourse or that for any other reason the appellant is not entitled to any compensation is not entitled to any compensation therefor, and if it shall be found that the land so appropriated constituted an obstruction wrongfully placed in said watercourse or that for any reason the appellant is not entitled to receive any compensation or damages therefor, no compensation or damages shall be awarded, and any deposit made by the drainage district shall be forthwith refunded to it (*Id.*, Sec. 46).

SECTION 3046. *Pay of Commissioners.* Sec. 79.—That each commissioner appointed under this act shall receive for his services the sum of three dollars per day for the time actually engaged in the performance of his duties, to be paid by the district (*Id.*, Sec. 47)."

It will be noticed that the steps to be taken are as follows:

The Board of Directors of the Drainage District determine what amount is necessary to be taken. They make a written application "to the JUDGE of the Dis-

trict Court praying for the appointment of three commissioners." Upon the presentation of this petition "the judge to whom the same is presented shall forthwith appoint such commissioners," which appointment is to be made in writing and the Drainage District is required to "without delay cause such application and certificate of appointment to be recorded in the office of the Register of Deeds." The next step is to give ten days' notice by publication of the time and place where the award of the commissioners will meet to assess damages. They shall "upon actual view appraise and assess the damages done to the owners of the property respectively." They must make their report in writing and file the same in the office of the County Clerk. Within ten days after the filing of such report if any owner deems himself aggrieved, that is not satisfied, with the award made him, he may appeal to the District Court where the case is tried *de novo* before a jury to ascertain the amount of damages. The district cannot enter upon his land during all of these proceedings unless it deposits with the County Treasurer for the benefit of the party entitled thereto, the amount of the award and in addition gives bond to pay all damages and costs which upon the trial may be adjudged.

We wish to emphasize the fact that the application for the appointment of appraisers is not filed with the clerk of any court nor is it docketed as a case in any court, nor is there any record required of any kind or description in any judicial tribunal.

Again, we wish the further fact to be borne in

mind that there is no trial had before the appraisers, no contest or controversy, no hearing of witnesses, no taking of testimony, but such commissioners are simply required to make actual view of the property and say what in their judgment the property is worth. There is at no step of these preliminary proceedings a controversy between the Drainage District and the owners of the property and no controversy arises until after the appraisers make their report and the owner determines whether or not he is satisfied with the value placed upon his property. Even should he be dissatisfied there is no controversy unless the Drainage District elects to proceed further in the acceptance of such report of the commissioners by the deposting of the amount so awarded, with the county treasurer. If the Drainage District elects to accept the award on its behalf and makes the deposit and if the owner of the property deems the amount of the award insufficient, then for the first time there arises a controversy between the parties. This controversy is initiated and made a matter of record by the filing of an appeal on the part of the property owners and the matter is then transferred to and docketed in the District Court of the county. Then for the first time is there a controversy existing before a judicial tribunal. At this point if the owner of the property be a non-resident and desires to litigate in the Federal Court, the amount of his damages, he can then file a petition for removal and this is the first time that there is a controversy pending in any court or tribunal that can be removed.

The Drainage District presented a petition to Judge

E. L. Fischer, who appointed commissioners to view and appraise the property therein described. While the petition and bond for removal was in fact presented by appellant prior to the making of the application by the district, we are inclined to waive all technicalities, and treat this case as though the petition and bond for removal was filed after the presentation of the application. Our contention being that there is no controversy or suit pending until after the commissioners have viewed the property, filed their report with the county clerk, and an appeal has been taken.

The subsequent proceedings were as follows:

The transcript was filed in the United States Circuit Court and thereupon a petition for an injunction was filed in aid of jurisdiction asking the Federal Court to enjoin the state court from proceeding further and to enjoin the commissioners appointed by the state court from acting, said bill of complaint being the one set forth on page 2 of the transcript of the record. The application for a temporary injunction came on for hearing and was granted by the United States District Judge. Thereupon the Drainage District appealed said case to the Circuit Court of Appeals of the Eighth Circuit, claiming that the Circuit Court of the United States had no jurisdiction and that the Circuit Court of the United States had no jurisdiction and that the injunction was improvidently awarded. After full and exhaustive argument and due deliberation thereon, the Circuit Court of Appeals sustained the contention of the Drainage District, the opinion being found in the 186 Federal Reporter at page 315 (West publication), and

is entitled *The Kaw Valley Drainage District of Wyandotte County, Kansas, et al. vs. Metropolitan Water* Company.

After the Court of Appeals had made the above ruling dissolving the temporary injunction, the original bill of complaint in the Circuit Court came on for hearing upon the demurrer and the Circuit Court sustained the demurrer of the Drainage District and it is from this order that the appeal is taken in this case. The demurrer was sustained upon the ground that the Circuit Court had no jurisdiction in the removal case, therefore no power to grant an injunction in aid thereof.

The only substantial question in this case is the question of whether the United States Circuit Court got any jurisdiction in the removal case, and in this argument we eliminate all technical questions and assume the facts to be in their most favorable light to the appellant.

First, we say that under the drainage law the presentation of a petition to the judge is not the commencement of a suit and does not institute any controversy. No papers were filed nor were any required to be filed with the clerk of the court. There was no case docketed. The only place where a copy was preserved was by a record in the office of the register of deeds of the county. It is to be presumed that upon the removal of a case there must be some certified record of some proceedings pending in some judicial tribunal to be filed with the clerk of the Federal Court but in this case there was no such record. They simply filed with the Circuit Court of the United States a copy of their petition and

bond for removal with certain papers attached thereto and a certificate by the register of deeds that they are a true copy of the papers on record in his office and the register of deeds is not a judicial tribunal nor are any proceedings pending before him. Hence it is impossible for us to conceive how it can be construed or held that there was any controversy pending anywhere at the time these pretended removal proceedings were taken. It will be noticed by the law of the State of Kansas herein copied that the petition may be presented to either the judge of the court of Common Pleas or to the judge of the District Court. The law further provides that where an appeal is taken, the appeal goes to the District Court. Now suppose the petition for the appointment of the commissioners had been made to the judge of the Court of Common Pleas and he had appointed the commissioners that court and judge would never again hear of the proceedings. There would be nothing pending in the court. Neither the judge of that court or the court itself would have any jurisdiction or anything further to do with the matter whatever. At no time would there be any proceedings filed in any court until an appeal was taken, when it would be docketed in the District Court. We call attention to this to emphasize the fact that the legislature might have designated any individual in Wyandotte County to appoint the commissioners. It might have said that the postmaster of Kansas City, Kansas, should appoint the commissioners or it might have said that the mayor of the city should make the appointment. Under such circumstances could it be contended for a moment that there was a proceeding pending before

a judicial tribunal which could be removed to the Federal Court? We do not now dispute nor did we ever dispute the fact that as soon as the appeal was taken to the District Court from the award of the commissioners, that a petition for removal could be filed and all proceedings removed to the Federal Court, but we have at all times contended that until such appeal is taken there is no controversy in existence and no suit pending.

And we contend further that there is absolutely no decision to be found contrary to our contention save and except a decision by the circuit judge of this district in a case that was not appealed and by the same judge who originally sustained the contention of appellants and whose judgment was reversed by the Circuit Court of Appeals. The decisions cited in appellant's brief do not contradict our position. In many states the legislature in providing for eminent domain, have provided for the institution of a suit in a judicial tribunal in the first instance. In all such cases of course there can be removal. Take for instance their citation of Colorado cases. An examination of the Colorado statutes will show that they provide for the institution of a suit and a jury trial as the very first step. In sustaining a removal from the state courts under the Colorado statute, this court in the case of *Searl* v *School District,* 124 U. S. 197, calls specific attention to that provision of the statute as being the ground why a removal is sustained. The language of this court in said decision is as follows:

> "The code of civil procedure of that state provides for the appropriation of private property for

public use, and authorizes a judicial proceeding in the district or county court for the purpose of ascertaining and awarding the amount of compensation to be paid therefor. It requires the filing of a petition setting forth the authority of the plaintiff to acquire the property in that mode, the purpose for which it is sought to be taken, a description of the property, and the names of all persons interested therein, who are to be made defendants and brought into court by the service of a summons or other process, as in other cases is provided by law. It provides, in the first instance, for the ascertainment of the amount of compensation or damages of compensation or damages by a commission of three freeholders, but also that before the appointment of such commissioners any defendant may demand a jury of six freeholders residing in the county, to ascertain, determine, and appraise the damages or compensation to be allowed, and prescribe in such case the mode of trial, at which the court or judge shall preside in the same manner and with like power as in other cases; that evidence shall be admitted or rejected by the court or judge according to the rules of law; and at the conclusion of the evidence that the matters in controversy may be argued by counsel to the jury, and at the conclusion of the argument that the court or judge shall instruct the jury in writing in the same manner as in cases at law; that motions for a new trial, and to set aside the verdict, may be made and heard as in other cases; that an appeal may be taken to the Supreme Court in the same manner as provided by law for taking appeals from the District Court to the Supreme Court; and that a writ of error from the Supreme Court shall lie in every such case to bring in review the final determination."

Or take another case referred to in appellant's brief and relied upon, to-wit, *Traction Company* v. *Mining Company*, 196 U. S. 239. That case is based upon

the Kentucky statute which provided likewise for a judicial proceeding.

In the case of *Metropolitan Water Company* v. *Kaw Valley Drainage District,* 186 Fed., 315, cited *supra,* the Circuit Court of Appeals discusses the Traction Company case at length and calls specific attention to the fact that under the Kentucky statute the initial proceedings were filed in a judicial court and summons issued thereon wherein a trial was to be had. Therefore, of course, the removal would lie but in that identical case this court cited with approval the case of *Boom Company* v. *Patterson,* 98 U. S. 403-406, in which case it was specifically held that in proceedings like the one at bar there could be no removal until after the appeal was taken and the case pending in a judicial tribunal. Every case cited in appellant's brief is where the condemnation proceedings were under statutes providing for initial proceedings in a judicial tribunal and where the parties are brought before the court for the settlement of the controversy. And over and against this we have numerous decisions that in all cases where the preliminary steps are administrative proceedings, they are not suits within the meaning of the removal act and do not become suits subject to removal until an appeal has been taken.

The case of *Upshur County* v. *Rich,* 135 U. S. 467, 10 S. C. R. 651, is a case directly in point. The syllabus reads as follows:

> "Act W. Va. 1883, provides that a person aggrieved by the assessment of his real estate, may after notice to the prosecuting attorney who shall

protect the state's interest, apply to the county court for redress; and if, on hearing the evidence, said court shall be of opinion that there is error in the assessment, it shall correct it. Held, that the power of the county courts under this act is ministerial, and the proceeding to correct assessments is not a suit within the meaning of the Revised Statutes, U. S., giving the right of removal to the federal courts of suits between citizens of different states." In the body of the opinion the court says:

"The general rule with regard to cases of this sort is that the initial proceeding of appraisement by commissioners is an administrative proceeding, and not a suit; but that, if an appeal is taken to a court, and a litigation is there instituted between parties, then it becomes a suit within the meaning of this act of congress."

The court then refers to the case of *Boom Co.* v. *Patterson*, 98 U. S. 403, quotes from it at some length, and continues:

"The principle to be deduced from these cases is that a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot in any just sense be called a "suit;" and that an appeal in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion and value, is not a suit; but that such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other. Applying this principle to the facts of the present case, it does not seem difficult to come to a decision. We have seen that although the appeal from the assessment was made to the "county court" *eo nomine*, yet that

this is not a judicial body, invested with judicial functions, except in matters of probate, but is the executive or administrative board of the county, charged with the management of its financial and executive affairs. According to the principles laid down by the state court, the acts of this board, in matters of taxation, are as purely administrative as are those of the county assessors in making the original assessment. Although we are not concluded by this decision, it is so much in harmony with our own decisions on the same subject that we accept it as correct. According to these views, the proceeding below was not properly removable to the Circuit Court of the United States, and ought to have been remanded to the state court.

The decree of the circuit court is reversed, and the cause remanded, with instructions to remand the same to the state court from which it was removed."

The case of *Hartford R. R. Co.* v. *Montague*, 94 Fed. 227, is likewise a case directly in point. The syllabus reads:

"Under the statutes of Connecticut relating to the condemnation of property under the power of eminent domain, which delegate to a judge of a state court the power to first determine the right to take the property, and then to appoint a commission to fix the compensation, such a proceeding is not a suit at common law or in equity, of which a federal court would have original jurisdiction under the judiciary act of 1888, and hence is not removable under such act."

This last decision is a full and comprehensive discussion of the question. It cites the *Boom V. Patterson* case and *Upshur County* v. *Rich*. In the opinion the court further says:

"In *Searl* v. *School Dist., supra*, especially re-

lied on by counsel for defendant, the condemnation proceedings under the Colorado law were held to be adversary judicial proceedings, because the defendant therein was entitled to a jury to ascertain, determine and appraise damages, presided over by a court which should pass upon the evidence offered according to the rules of law, and further to a motion for a new trial and an appeal to the Supreme Court, and a writ of error therefrom. And the court implies that, if there was nothing more than an appeal to the commissioners to ascertain compensation, the proceedings even under the prior removal act, would not be a suit at law.

It seems clear that the proceedings in these cases could not have been originally begun in the circuit court of the United States. They were originated by a board of commissioners who should be freeholders, or were brought before a county court, which had the power to exercise various functions, but not those of a judicial nature, as in *Upshur Co.* v. *Rich, supra.* Mr. Justice Bradley there said that the assessment made by such a court could not be called a suit, and could not thus be removed and "the appeal from the assessment * * * was not a suit, or within the meaning of the removal act, though approaching very near the line of demarkation.

The statute of Connecticut under which these proceedings were taken provides that the railroad company 'may apply to any judge of the superior court for the appointment of appraisers to estimate all damages that may arise to any person from the taking and occupation of such real estate for railroad purposes, and after reasonable notice * * * such judge shall appoint three appraisers who shall * * * view the premises and estimate such damages, and * * * return an appraisal of such damages in writing, under their hands, to the clerk of the superior court in the county where the estate lies, who shall record it; and when so re-

turned and recorded, such appraisal shall have the effect of a judgment and execution may issue at the end of sixty days,' etc. This is a proceeding for the taking of land and appraisal of damages, without any provision for a trial by a jury or by a court, and not based, necessarily, upon the introduction of any evidence, except that the appraisers 'shall view the premises," and without any provision for an appeal by the party aggrieved.

If the application to the judge in the case at bar is analogous to those in the foregoing cases, as is claimed by counsel for defendant and if it might have been removable under the earlier removal act, it cannot be claimed that it is a suit which could have been originally brought in the Circuit Court. It is only the first step in a proceeding which has not assumed the shape of a pending suit, and in which there is to be no trial of questions of fact or of law, and no jury and no appeal."

The case of *Myers* v. *Chicago Northwestern Ry Co.*, 91 N. W. 1076, while not a federal decision, is an exhaustive discussion of the entire subject by the Supreme Court of Iowa, in which decisions are cited from almost every state in the union and a large number of decisions by the Supreme Court of the United States, upon the propostion that these proceedings are not of that class that could have been originally instituted in the Federal Court and that by reason of such fact there could be no removal until after the appeal from the award of the commissioners. After reviewing the decisions the court says:

"Indeed the proceeding insofar as the District Court is concerned was initiated by the notice of appeal. In such a case the court in no sense reviews previous findings but investigates the value of the

property taken *de nova.*"

It is well settled by the decisions of the U. S. Supreme Court that "a case cannot be removed into the Federal Court unless it could originally have been taken there."

> *Tennessee* v. *Union Bank,* 152 U. S. 454.
> *Railroad Co.* v. *Davidson,* 157 U. S. 201, 15 S. C. R. 563.

> "We must hold therefore, as has, indeed, already been ruled (*Tennessee* v. *Union & Planters' Bank,* 152 U. S. 454, 14 Sup. Ct. 654), that the jurisdiction of the circuit courts on removal by the defendant, under this section, is limited to such suits as might have been brought in that court by the plaintiff under the first section. The question is a question of jurisdiction as such and cannot be waived. *Capron* v. *Van Noorden,* 2 Cranch. 126; *Railway Co.* v. *Swan,* 111 U. S. 379, 4 S. C. R. 510."

> *Mexican Nat. R. Co.* v. *Davidson,* 157 U. S. 201, 15 S. C. R. 563.

In the case of *South Dakota Ry. Co.* v. *Chicago, M. & St. P. Ry. Co.,* 151 Fed. 578 (C. C. A. Eighth Dist.), this court in passing upon removal of cases under the South Dakota law, comments as follows:

> "The statutes of South Dakota provide that where a corporation invested with the power of taking private property for public use, desire to do so, it shall file a petition in the circuit court of the county in which the property is situated, and that the party filing the petition shall be named therein as the plaintiff and all persons affected by the proceeding shall be named as defendants, and the petition must contain a description of the property to be taken. It is further provided that a summons may issue which shall be entitled in the action or

proceeding and which shall state the time and place of filing the petition, the nature of the proceeding, and contain a notice to the effect that if the defendants do not appear in said proceeding within 20 days from the service of the notice, exclusive of the day of service, the plaintiff will apply to the court to impanel a jury and ascertain the compensation. Provision is also made for the publication of the summons on defendants who are non-residents as in other actions. It is further provided that upon affidavit of the default of the defendants the plaintiff may apply to the court to draw and summon jurors, and that the proceedings of impaneling the jury and rendering a verdict may be had during a regular term of the court, or in case of default that a special term of court shall be held at which the proceedings in impaneling a jury, trial, and rendering the verdict shall be conducted in the same manner as trials of actions in the Circuit Court, giving to defendants the right to challenge jurors and the right to examine and cross-examine witnesses. It is further provided that the jury shall ascertain and return in their verdict the compensation to be paid for each lot or parcel of land or property taken or damaged. It is also provided that the only issue or question to be tried by the jury shall be the amount of compensation for the property taken or damaged, and that upon the return of the verdict the same shall be recorded and a judgment entered thereon. Provision is also made for appeal the same as in other actions.

Proceedings under these statutes are, we think, civil suits within the meaning of the act of 1887, and where the necessary diverse citizenship exists and the amount in controversy is sufficient are removable under the provisions of that act."

We note that this court lays emphasis upon the fact that under their statute the proceedings were instituted in a regular judicial court and summons issued, issues joined, with provision for the impaneling of a

jury, etc. Under such circumstances, of course, it is a civil suit but none of those elements are in the case at bar.

In the case of *Helen Power Co.* v. *Spratt,* 146 Fed. 311, the court says:

> "The proceeding under the statutes of the State of Montana must be in court from its initiation. It is therefore to be distinguished from a proceeding purely administrative until report is filed." Citing Boom Co. vs. Patterson and Upshur vs. Rich cases.

In this last case the distinction is recognized radically that where the proceedings are before commissioners appointed they are purely administrative until a report is filed and an appeal taken.

In the case of *Waha-Lewiston Water Company* v. *Lewiston-Sweetwater Irrigation Co.,* 158 Fed. Rep. 137, we find a case where under the Idaho statutes for the appropriation and distribution of water, the first application is made to the state engineers, who, if they approve the plan, issue a permit and either party feeling himself aggrieved by the action of the state engineer, may take an appeal to the District Court of the county. In the opinion the court refers to the *Upshur* v. *Rich* case and the *Boom Co.* v. *Patterson* case as determining that there was no removal until after the appeal had been taken to the state circuit court. We quote from the opinion as follows:

> In *Upshur County* v. *Rich,* 135 U. S. 467, the earlier cases decided by that court are collocated and commented upon, and the principle was deduced therefrom that a proceeding not in a court of

> justice, but carried on by executive officers in the exercise of their proper functions, as, for instance, the valuation of property for the purpose of taxation, is purely administrative and cannot be regarded as a "suit," and that an appeal in such case to a board having no judicial powers is not a suit; "but that such an appeal may become a suit if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on one side and the other." * * *
>
> It seems clear to me, that when the Idaho corporation took this proceeding by appeal into the state District Court for Nez Perce County, it was brought within this principle and became a "suit."

In Pacific Removal cases, 115 U. S. 1-25, 29 Sup. Ct., 319, the City of Kansas instituted proceedings for widening a street through the depot grounds and thereby taking a portion of ground and property of many persons. A jury was summoned before the mayor to inquire and find the value of the property taken for the street and to assess the amount upon surrounding property. The laws of Missouri gave to any party dissatisfied, an appeal to the Circuit Court of Jackson County, and such appeals were filed. After the case was certified to the Circuit Court of Jackson County, petition for removal was filed. In the syllabus the U. S. Supreme Court says:

> "On proceedings for widening a street a trial before the mayor is in its nature an inquest of valuations and assessments, not having the character of a suit, and a petition for removal may be filed after appeal taken to a state court."

In the opinion the court says:

> "The second ground of objection, that the cause had been once tried before the mayor by a

jury, and an appeal taken, before a petition for removal was filed, and therefore the application was too late, is answered by the reasoning of this court in the case of *Boom Co.* v. *Patterson*, 98 U. S. 403, which was a case very similar in this respect to the present. It was there held that the preliminary proceedings were in the nature of an inquest to ascertain the value of the property condemned, or sought to be condemned by the right of eminent domain, and was not a suit at law in the ordinary sense of those terms, consequently not 'a suit' within the meaning of the removal acts; but that 'when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the state, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents.' That case we think governs the present, so far at least as relates to the trial before the mayor, which was in its nature an inquest of valuations and assessments, not having the character of a suit."

A board of county commissioners of a county created by the laws of the State of Nebraska is in no just or proper sense a court within the meaning of the removal acts. A proceeding pending before such county commissioners for a public road does not constitute a suit within the meaning of said acts."

14 Fed. 17.

The case of *Fishblatt* v. *Atlantic City*, 174 Fed. 197, shows the distinction between an inquest and a suit. We quote from the opinion:

"The proceedings removed into this court were instituted by Atlantic City before a justice of the Supreme Court of the State of New Jersey, under the statutes of said state, for the purpose of condemning and taking a strip of land owned by Isabella S. Fishblatt. Commissioners to estimate the damages for the taking of such property

> lantic circuit court, of said state, and thereupon she removed the entire proceedings into this court."

And it was held that after the appeal it was then a suit that could be removed and by inference they held that it could not be removed prior to that time as a removal to the Federal Court must be taken at the first stage when it can be applied for.

In *Colorado Midland Ry. Co.* v. *Jones*, 29 Fed. 195, the court says:

> "With the question of the appropriation of the land sought to be taken, the government of the United States, a separate sovereignty, unless it is the party seeking the condemnation, has nothing to do; and no foreign corporation can, in the courts of the United States, condemn the land of a citizen of a state for the use of such corporation; and, if the federal courts have not original jurisdiction for such purposes, a proceeding of that kind instituted in the state court cannot be removed to the federal courts, because the federal courts can under no circumstances have jurisdiction in such cases. The contrary doctrine would destroy every vestige of control which a state has over its internal affairs."

It may be that counsel for the appellees will cite the case of *Deepwater Ry. Co.* v. *Western Pocahontas C. L. Co.*, 152 Fed. 824, and the second section of the syllabus applies to the facts as stated in that case and a reading from the decision on page 827 will show that in that case the proceedings were instituted in the regular judicial tribunal of the county and the issuance of a summons by the clerk of the court. The court uses these significant words:

> "Considering the first proposition it is never

> to be forgotten that in West Virginia the common law practice prevails unless expressly modified by statute and that at common law the beginning of a suit is the issuance of the original writ—the summons from the clerk's office signed by the clerk."

They then quote the provisions of the West Virginia statute and the court then proceeds:

> "From these provisions it would seem to me that this proceeding must be regarded as a sum- were appointed, and on the coming in of their report an appeal was taken by the owner to the Atmary one provided by the statute solely and alone upon the presentation of the application to the court in session."

Under the facts in that case there is notice given pleadings filed and a controversy before "a court in session." The judge even expressed a doubt by saying:

> "But if I am wrong as to my conclusion as to how the first question is to be answered, I have little doubt as to the answer to the second," etc.

And therefore the case primarily goes off on the second proposition and not on the first.

Again, the only other case that we have been able to find that even in the remotest degree supports the contention of appellants, is the case of the *Metropolitan Water Company* v. *Kansas City, Kansas,* in the 164 Fed. eral, which decision was rendered by Judge Pollock, the same judge rendering the decision in these cases, which was reversed by the Court of Appeals. However, even in that case the facts were entirely different from the cases at bar. Under the law applicable in the Kansas City case the commissioners were to take evidence and otherwise ascertain the value of the property. If

such fact constituted the commissioners a court, then perhaps a removal might be proper in that case but in the cases at bar there is no such provision of statute. There is no taking of evidence or hearing any evidence but the commissioners are simply called upon to view the premises and make a report as to what in their judgment is its value and such proceedings are in the nature of an inquest or administrative and not such a proceeding as could be called a "suit" or controversy within the removal act.

In conclusion we submit a copy in full of the decision of the United States Circuit Court of Appeals in this identical case, which states the facts, reviews the decisions and decides the case. In addition we are informed that the appellant applied to this court for a writ of certiorari in that case and the same was denied, thereby in substance affirming and making the decision of said Circuit Court of Appeals the settled law in this case.

The decision of the Circuit Court of Appeals is as follows:

> *"United States Circuit Court of Appeals, Eighth Circuit. No. 3566, December Term, A. D. 1910. The Kaw Valley Drainage District of Wyandotte County, Kansas, George Stumpf, L. J. Mason and Al Mebus, Appellants, vs. Metropolitan Water Company, Appellee. Appeal from the Circuit Court of the United States for the District of Kansas. Mr. L. W. Keplinger and Mr. C. W. Trickett, for Appellants. Mr. Willard P. Hall, Mr. Charles F. Hutchings and Mr. O. L. Miller (Messrs. Miller, Buchan & Miller, Mr. Samuel Maher and Mr. McCabe Moore on brief) for Ap-*

pellees. Before Hook and Adams, Circuit Judges, and Wm. H. Munger, District Judge.

Wm. H. Munger, District Judge, delivered the opinion of the Court.

The legislature of the State of Kansas in 1905 authorized the formation of drainage districts in the several counties of the state by the Board of County Commissioners, upon the presentation to them of a proper petition, showing that the lands and property therein embraced are subject to injury and damage from the overflow of some natural water course, naming or describing it, and that the improvement of the channel or water course, the construction and maintenance of levees, drains or other works, are necessary to prevent such overflow, and that such improvement or work will be conductive to the public health, convenience or welfare. Upon the organization of such district it was provided that the taxpayers residing within the district should elect a board of five directors and said drainage district should be declared to be a body corporate with power to sue and be sued in its corporate name.

The statute provided, in substance, that the board of directors shall have power, whenever it shall be deemed necessary to appropriate any private property for use by the district in widening, deepening or otherwise improving, any natural water course to prevent the overflow thereof, or for the construction of any levee, to cause a survey and description of the lands so required to be made by some competent engineer and filed with its secretary. The board was thereafter authoribed to make an order declaring that the appropriation of such land was necessary, setting forth for what purpose the same was to be used. The board of directors, as soon as practicable thereafter, was required to present a written application to the judge of the District Court or the Court of Common Pleas of the county in which the land was situated, describing the land sought to be taken, setting forth

the necessity for the appropriation thereof for the use of the district, and praying for the appointment of three commissioners to make appraisement and assessment of damages therefor. Upon the presentation of such petition by such board of directors, or its attorney, the judge to whom the same was presented was required forthwith in writing to appoint such commissioners, and deliver a certificate thereof to the said board of directors, or its attorney, who were required without delay to cause the application and certificate of appointment to be recorded in the office of the register of deeds of the county. The commissioners so appointed were required to take an oath to honestly and faithfully discharge their duties, and to give all owners of property sought to be taken at least ten days' notice of the time and place when and where the damages would be assessed, such notice to be given by one publication in some newspaper published in the county, and at the time fixed in such notice the commissioners were required, upon actual view, to appraise the value of the lands taken and to assess the other damages done to the owners of the property, respectively, by such appropriation. The commissioners were authorized to adjourn from time to time as they deemed convenient, correct all errors or omissions in the giving of notice by serving new notices or making new publications, and were authorized to make from time to time partial reports, and upon completing their duties to make a final report. Such reports were to be in writing and filed in the office of the clerk of the county. In such reports the commissioners were required to accurately describe the land by them set forth and appropriated, the purpose for which the same were taken, the name of each owner, if known, and appraise each owner's interest and assess his damages separately. The county clerk was required, upon any such report being filed, forthwith to prepare and deposit a copy thereof in the office of the treasurer of the county, and if the drainage district should pay to such treasurer the amount in full of

such appraisement within ninety days of the time of filing such report it was the duty of the treasurer to thereupon pay the same to the person or persons severally entitled thereto.

Any person being or claiming to be the owner of any lands so condemned or appropriated, deeming himself aggrieved by the award of such commissioners, could appeal from the ward of said commissioners to the District Court of the County, but such appeal should only affect the amount of compensation to be allowed and should not delay the prosecution of the work of the district, upon the district paying or depositing the amount assessed by such commissioners with the county treasurer, as aforesaid, and said district, upon executing a bond with sufficient surety to be approved by the county clerk to pay all damages or costs which said district might be adjudged to pay by said District Court, was authorized, notwithstanding such appeal, to take possession of, appropriate and use said land for the purposes for which it was condemned. Provision was also made in the statute allowing the drainage district, under certain conditions, to appeal if desired from the award of such commissioners.

The Kaw Valley Drainage District, organized pursuant to the statute, on the 4th day of January, 1911, by its board of directors, presented its application to the judge of the District Court of Wyandotte County, reciting the facts required by the statute to be recited in such application, praying for the appointment of commissioners to assess the damages to the owners of the property sought to be taken and damaged. On the following day, January 5th, respondent presented to the judge of the District Court of Wyandotte County a petition and bond for the removal of such proceedings, instituted and taken by said drainage district for the appointment of commissioners, as aforesaid, to the Circuit Court of the United States for the District of Kansas, said petition and bond being in proper

form and the security adequate. Such petition and bond were filed with the clerk of the District Court of said Wyandotte County. The petition for removal was by the judge of said court denied, and the appellants, Stumpf, Mason and Mebus, were by said judge appointed commissioners. The commissioners accepted the office, took the oath required by statute, and on the 6th day of January, 1911, caused a notice to be published, being such notice as was required by the statute, stating that they (the commissioners) would meet at 10 o'clock a. m., on the 19th day of January, 1911, at the east end of the James Street Bridge over the Kansas River, in Kansas City, Kansas, and thereupon proceed, upon actual view, to condemn for the use of the drainage district the tracts of land described in the notice, and appraise the value of the land and assess the true damages done to the owners thereof.

Thereafter, and on the 13th day of January, 1911, plaintiff, having filed a transcript of the proceedings relating to the removal in the Circuit Court of the United States, filed its bill in the Circuit Court of the United States for the District of Kansas, setting forth the proceedings of said drainage district for the apointment of the commissioners, its application to remove said proceedings into the United States Court, that such proceedings were of a civil nature and properly removable to the Circuit Court of the United States, and praying for an injunction to restrain said drainage district and the commissioners so appointed from farther proceeding in said matter, for the reason that the entire proceeding was then pending in the Circuit Court of the United States, and such commissioners had no authority to thereafter proceed excepting by the order and direction of said Circuit Court. It was further alleged that the said legislative enactment was unconstitutional and void, in that it deprived complainant of its lands without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, in

that it authorized after the award of damages by the commissioners, the taking possession of the lands so appropriated by the drainage district to its own use, pending an appeal to the District Court. A temporary order of injunction was granted as prayed; from such order the drainage district has prosecuted this appeal.

The power of eminent domain is one which the state may exercise for any public purpose. Whether the purpose for which property is sought to be taken and used be a public one is undoubtedly the subject of judicial determination in a proper case. If the use be a public one, and it is here, whether the necessity for the taking exists is exclusively within the province of the legislature of the state to say; such necessity may be determined by a direct legislative enactment or its determination may be by the legislature delegated to some officer or board. The question of the necessity is not necessarily one of a judicial character. *Buckwalter* v. *School District*, 65 Kans. 603; *Boom Co.* v. *Patterson*, 98 U. S. 403-406; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557-569. It was said in the last cited case:

'Neither can it be said that there is any fundamental right secured by the Constitution of the United States to have the question of compensation and necessity both passed upon by one and the same jury. In many states the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the legislature, or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of a judicial character, but rather one for determination by the law-making branch of the government. * * *

'It is within the power of the state to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial in the ordinary way; or it may

provide that the question shall be settled by a sheriff's jury, as it was constituted at common law, without the presence of a trial judge. These are questions of procedure which do not enter into or form the basis of fundamental right. All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution."

While it is true that the state may not deprive the Federal Court of its jurisdiction to determine matters of a judicial nature which are within the Federal Judiciary Act, it by no means follows that, in all instances, the proceedings to take private property for public use, which are prescribed by the sovereign power of the state, must be from the inception judicial.

Boom Co. v. *Patterson, supra,* was a case in which condemnation procedings had been instituted in the State of Minnesota. The statute of that state provided that the party seeking to condemn private property for a public use should apply to the District Court of the county in which the property was situated for the appointment of commissioners to appraise its value and take proceedings for its condemnation. The law provided that they should give notice to the owners of the land before the appraisement was made. If the award of the commissioners should not be satisfactory, anyone claiming an interest in the land was authorized to take an appeal to the District Court, where it was to be entered by the clerk 'as a case upon the docket.' The court was then required to 'proceed and determine such case in the same manner as other cases are heard and determined in said court.' In that case an appeal was taken to the District Court of the State from the award of damages by the commissioners, and the cause thereafter removed from the District Court of the State to the United

States Court. The question was presented as to whether or not the United States Court acquired jurisdiction in removal, the court saying: 'The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest, to ascertain its value, and not a suit at law in the ordinary sense of those words. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the state, the form of a suit at law and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court.'

In Pacific Railroad Removal Cases, 115 U. S. 1, among the questions presented was one as to when a condemnation proceeding instituted by the City of Kansas City, Missouri, for the purpose of widening a street running through the depot grounds of the railroad, became an action so as to be removed into the Federal Court. By the statute law in that case, proceedings were instituted and tried before the mayor and a jury, from which an appeal could be taken to the Circuit Court of the county. The case was tried before the mayor and a jury and an appeal taken to the Circuit Court and removed from the Circuit Court of the county to the Circuit Court of the United States. It was contended in opposition to the removal that, as it was a case that had once been tried before the mayor and a jury, the application to remove after the appeal to the Circuit Court came too late. The court, on page 18, said: 'The second ground of objection, that the cause had been once tried before the mayor by a jury, and an appeal taken, before a petition for removal was filed, and therefore the application was too late, is answered by the reasoning of this court in the case of *The Boom Co.* v. *Patterson*, 98 U. S. 403, which was a case very similar in this respect to the present. It was there

held that the preliminary proceedings were in the nature of an inquest to ascertain the value of the property condemned, or sought to be condemned by the right of eminent domain, and was "not a suit at law in the ordinary sense of those terms," consequently not "a suit" within the meaning of the removal acts; but that "when it was transferred to the District Court by appeal from the ward of the commissioners, it took, under the statute of the state, the form of a suit at law and was thenceforth subject to its ordinary rules and incidents."

Searle v. *School District,* 124 U. S. 197, was a case in which condemnation proceedings had been instituted in Colorado by the School District, to condemn certain land for school purposes. The statute law of Colorado was summarized by Justice Matthews, who delivered the opinion of the court, as follows:

'The code of civil procedure of that state provides for the appropriation of private property for public use, and authorizes a judicial proceeding in the District or County court for the purpose of ascertaining and awarding the amount of compensation to be paid therefor. It requires the filing of a petition setting forth the authority of the plaintiff to acquire the property in that mode, the purpose for which it is sought to be taken, a description of the property, and the names of all persons interested therein, who are to be made defendants and brought into court by the service of a summons or other process, as in other cases is provided by law. It provides, in the first instance, for the ascertainment of the amount of compensation or damages by a commission of three freeholders, but also that before the appointment of such commissioners any defendant may demand a jury of six freeholders residing in the county, to ascertain, determine, and appraise the damages or compensation to be allowed, and prescribes in such case the mode of trial, at which the court or judge shall preside in the same manner and with like power as in other cases;

that evidence shall be admitted or rejected by the court or judge according to the rules of law; and at the conclusion of the evidence that the matters in controversy may be argued by counsel to the jury, and at the conclusion of the argument that the court or judge shall instruct the jury in writing in the same manner as in cases at law; that motions for a new trial, and to set aside the verdict, may be made and heard as in other cases; that an appeal may be taken to the Supreme Court in the same manner as provided by law for taking appeals from the District Court to the Supreme Court; and that a writ of error from the Supreme Court shall lie in every such case to bring in review the final determination."

It was held that such proceeding was a suit within the meaning of the Constitution and acts of congress, conferring jurisdiction upon the courts of the United States. Comparing the case with the cases of *Boom Co.* v. *Patterson* and Pacific Railroad Removal Cases, it was said:

'The appointment of the commissioners is not, as in the case of *Boom Co.* v. *Patterson* and the Pacific Railroad Removal Cases, a step taken by the party seeking to make the appropriation exparte and antecedent to the actual commencement of the adversary proceeding inter partes, which constitutes a suit in which the controversy takes on the form of a judicial proceeding. Because under the Colorado law the appointment of the commissioners is a step in the suit after the filing of the petition and the service of summons upon the defendant. It is an adversary judicial proceeding from the beginning. The appointment of commissioners to as certain the compensation is only one of the modes by which it is to be determined. The proceeding is, therefore, a suit at law from the time of the filing of the petition and the service of process upon the defendant.'

It is, however, urged that the more recent case of *Traction Co.* v. *Mining Co.*, 196 U. S. 239,

is a final determination that any step or proceeding by the state to take private property for public use is, from its inception, a civil action within the meaning of the Federal Judiciary Act. We find nothing in that case which warrants such conclusion. The language of the court in each opinion must be construed with reference to the case before the court. In that case, the court was considering the question whether, under the statute law of Kentucky, a condemnation proceeding was, from the inception, a suit or action within the meaning of the Judiciary Act. Under the statute of Kentucky the proceeding to take private property for public use required the filing of a petition in the office of the County Court, containing a description of the land, etc., and have commissioners appointed to assess the damages to which the owner was entitled. The commissioners were required to make their award of damages in writing, giving the names of the owners, etc. The clerk of the court was required to issue process against the owners of the property to show cause why the report should not be confirmed. At the first regular term after the owners should have been summoned, the court was required to examine the report and pass upon it. If exceptions were filed by either party, it was required that a jury be impanelled to try the issue of fact and judgment rendered in conformity to the verdict, if sufficient cause to the contrary should not be shown. Each and every step taken was a proceeding in the County Court. Either party was entitled to appeal to the Circuit Court. In that case, after the report of the commissioners had been filed and process issued against the Mining Company, it filed its petition and bond for removal of the case before the court had taken action upon the report. The contention in the case was that, as the Federal Court could not, under the Judiciary Act of 1887 and 1888, acquire jurisdiction by removal, except in cases in which the court would have had original jurisdiction, removal could not be had because the proceeding being one in

which the state was exercising, a sovereign power, the Federal Court would not have original jurisdiction. It was, however, held that, under the statutes of Kentucky, the state had delegated the right to exercise this sovereign power to the Traction Company, that such exercise was to be had by instituting a civil action in the County Court, which court was, under the constitution of Kentucky, a part of the judicial system of that state; that commissioners were to be appointed to ascertain the damages, and process should issue against the Mining Company; that if exceptions were filed to their report which presented any issue of fact, such issue of fact was to be tried in court as other cases. Under the Kentucky statute there was nothing to prevent the Federal Court from fully and completely exercising the jurisdiction conferred upon the County Court The petition could have been filed in the Circuit Court of the United States, commissioners appointed by that Court, process to defendant could have been issued from that court, exceptions filed to their report, and issues of fact tried by a jury and judgment rendered thereon in that court as in the County Court. In that case the doctrine announced in *Boom Co.* v. *Patterson* and Pacific Railroad Removal Cases, *supra,* that condemnation proceedings may, in their inception, be merely an administrative inquest and not a civil action, was in no respect criticised or overturned, but *Boom Co.* v. *Patterson* was cited with approval.

In this case, involving a consideration of the Kansas statute, we are unable to perceive upon what theory it can be said that the proceeding anterior to the appeal was a civil action, which could have been instituted in the Federal Court. The petition for the appointment of commissioners is not required to be presented to a court. It is to be presented to the judge of the District or Common Pleas Court, and then, with his order appointing commissioners, filed not in court but with the register of deeds. The legislature might have

designated that the petition should be presented and commissioners named by any executive officer of the state or county. The designation of the judge was merely a description of the person or official who was to act upon the petition in the first instance. The report of the commissioners was not filed in any court but was to be filed with the county clerk. No exceptions to the report of the commissioners could be made or heard. No proceedings in court were had until an appeal should be taken from the award of the commissioners. When such appeal was taken and lodged in the District Court a civil action was for the first time pending.

The several decisions of the Supreme Court, relating to this subject, are in perfect harmony, to the effect that the power of eminent domain may be exercised by the state in such mode as it sees fit. It may be by administrative inquest, if provision is made permitting a determination of the amount of damages by a civil action at some period before the proceedings become final, or the proceeding may be by a civil action at the outset. If the former, the Federal Courts are without jurisdiction until the proceedings assume the character of a civil action, when, by the latter mode, Federal Courts may have jurisdiction from the inception of the proceeding, if the requisite diversity of citizenship and amount in controversy exist.

Complainant's contention that the statute violates the Fourteenth Amendment to the Constitution of the United States, in that it deprives complainant of its land without due process of law, by permitting the drainage district to take possession of the land pending the final hearing upon appeal, by paying the amount of the appraisement and giving an approved bond to pay any additional sum which should be awarded upon such appeal, has been too often decided against such contention to require extended consideration. The question was before the court in *Backus* v. *Fort Street Union*

Depot Co., supra, and it was said: 'Does this amount to a denial of the right to that protection to property which is guaranteed by the Fourteenth Amendment to the Federal Constitution? In other words, is it beyond the power of a state to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and payment thereof? This question is fully answered by the opinions of this court in *Cherokee Nation* v. *Southern Knasas Railway,* 135 U. S. 641, and *Sweet* v. *Rechel,* 159 U. S. 380. There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof.'

The bill in this case, having been filed in aid of a jurisdiction wrongfully assumed, it follows that the injunction was improvidently awarded, and the judgment of the Circuit Court granting to complainant a temporary injunction is reversed, and the cause is remanded for proceedings in accordance herewith.

Filed February 24, 1911.

A true copy.

Attest: John D. Jordan, Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

(Seal)."

In view of these decisions we believe it to be the settled law that in proceedings of this kind under statutes like those of Kansas, there is no suit pending and no controversy within the removal act until after an appeal has been taken from the award of the commissioners to the District Court. We concede to the fullest extent that after such appeal has been taken to the District Court of the state that it is then removable to the

United States Circuit Court. For these reasons the judgment of the lower court should be affirmed.

THE CASE NOT REMOVABLE IN ANY STAGE.

In the foregoing we have assumed and conceded for the sake of the argument that at a later stage the case would be removable but that it would be removable at any stage we doubt, in fact, we deny. The Kansas River is a navigable stream, *Wood* v. *Fowler*, 26 Kan. 682. Organized as it is under Chapter 215, Laws of 1905, Art. 2, Chapter 34, Gen. Stat. 1909, it is an agency of the state organized for the exercise of purely governmental functions only. The language of the court in 125 S. W. 134, applies here. "Such an agency is *sui generis* and its powers cannot be likened to those of municipal corporations whose powers are broader and more general within their prescribed territory over the subjects delegated to them. It exercises no governmental powers except those expressly granted by the legislative authority which called them into existence and this only in the manner pointed out or by fair implication."

In *Osawatomie* v. *Miami County*, 78 Kan. 275, the court in commenting upon the suggestion that the functions exercised may more directly affect the people of a limited territory be the test in determining the question whether the action be that of the state or of some subdivision thereof, says: "The geographical or territorial test proposed may be helpful in some instances and even determinative in certain classes of cases. * * * We think the more vital consideration has relation to the character of power in the exercise of which the demand originates."

To properly care for the mouth of this navigable stream, though it may specially benefit the people of the district, is a duty which the state owes to the general public. As a consideration of its limited powers will show the district can act only as the agent of the state in the exercise of governmental functions. For which reason the state and not the district should be regarded as the real party.

Respectfully submitted,

L. W. KEPLINGER,

C. W. TRICKETT,

Counsel for Appellees.

METROPOLITAN WATER COMPANY *v.* KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 844. Argued January 16, 1912.—Decided February 19, 1912.

A direction in the mandate that the court below proceed in accordance with the opinion operates to make the opinion a part of the mandate as completely as though set out at length.

On appeal from a mere interlocutory order the Circuit Court of Appeals may direct the bill to be dismissed if it appears that the complainant is not entitled to maintain his suit.

Where the Circuit Court of Appeals has authority to make a ruling which finally disposes of the case, and the defeated party does not successfully prosecute either the certification of the question of jurisdiction to this court, or writ of certiorari from this court, the judgment of the Circuit Court of Appeals remains conclusive upon the parties and binding upon the Circuit Court and any other court to which the case can be taken. *Brown* v. *Alton Water Company*, 222 U. S. 325.

THE Metropolitan Water Company, a corporation of the State of West Virginia, owned land which the Kaw Valley Drainage District, a corporation of the State of Kansas, desired to acquire for public purposes.

Under the provisions of the act regulating the condemnation of land, the defendant in error presented to the

Judge of the District Court of Wyandotte County, a petition for the appointment of commissioners to value the property of the complainant necessary to be condemned for drainage purposes. The Water Company immediately filed with the judge a petition to remove the case to the United States Circuit Court. After argument this petition was denied and commissioners were appointed. The complainant at once filed, in the United States Circuit Court, its bill in aid of the removal proceeding praying that the defendant and the commissioners be enjoined from further prosecuting the condemnation proceedings. Among other things it alleged that the act violated the Fourteenth Amendment because it deprived the complainant of its property before judicial ascertainment of its value and before payment—in that when the report of the commissioners was filed with the register of deeds, the defendant, on paying the amount of the award, could take possession of the property; and, though an appeal to the District Court was permitted, the defendant could retain possession in the meantime on giving bond to pay the amount of the verdict.

To this bill the defendant demurred, and after a hearing a temporary injunction was granted, restraining the defendant from proceeding further to condemn the property of the complainant. This order was reversed by the Circuit Court of Appeals, which, in an elaborate opinion, held that the statute was valid and that until an appeal was taken from the award of the commissioners the proceeding was in the nature of an inquest to determine damages, and not a "suit" within the meaning of the Removal Statute, and therefore not removable into the Federal court thereunder (186 Fed. Rep. 315)

The mandate directed "that the order granting the injunction be reversed and that the cause be, and the same is hereby, remanded to the said Circuit Court with directions for proceeding in accordance with the opinion

of this court." On the return of the mandate the Circuit Court sustained the demurrer, and, in allowing the appeal to this court, certified that it dismissed the bill solely on the ground of the want of jurisdiction.

Mr. Willard P. Hall for appellant.

Mr. L. W. Keplinger and *Mr. C. W. Trickett* for appellees submitted.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court.

While in form this is an appeal from the decree of the Circuit Court for the District of Kansas, it is really an effort to review a decision of the Circuit Court of Appeals of the Eighth Circuit. From the statement of facts it is manifest that in dismissing the bill the Circuit Court merely applied the ruling that the petition for the appointment of commissioners was not the institution of a "suit" within the meaning of the Removal Act. If there was no suit which could be removed, it was not possible to maintain a bill in aid of removal proceedings thus decided to be void. When, therefore, the Circuit Court followed the opinion to its logical conclusion and dismissed the bill, it did only what it was bound to do. In obeying these directions it committed no error, and its decree cannot be reversed, even if it should appear that the Court of Appeals erred in holding that the condemnation proceedings did not amount to a suit within the meaning of the Removal Acts. The complainant had another remedy to test the correctness of that decision. It was open to it to ask the Circuit Court of Appeals to certify the question of jurisdiction to this court. If that motion had been overruled, the complainant had the further right to apply for a writ of certiorari. If the writ

had been granted, the question of jurisdiction could have been tested here. If the writ of certiorari had been then denied, the complainant would have remained bound by the decision of the Circuit Court of Appeals as the law of the case which could be changed neither by the Circuit Court directly, nor indirectly by the reversal of a decree properly entered in pursuance of the mandate of the appellate court. *Aspen Mining & S. Co.* v. *Billings*, 150 U. S. 31, 37.

The case here is not like *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356, 361, where the judgment of the Circuit Court that the declaration was "insufficient in law" (130 Fed. Rep. 593), was reversed by the Circuit Court of Appeals and remanded "for further proceedings according to law" (140 Fed. Rep. 305, 315). At the trial there was a verdict for the plaintiff. But during that hearing the defendant moved that the action be dismissed because the court was without jurisdiction. It was held that from this decision an appeal could be taken under § 5 of the act of 1891.

The case is ruled by *Brown* v. *Alton Water Co.*, 222 U. S. 325, although the facts there were the converse of those shown by the present record. There the Circuit Court dismissed the bill for want of jurisdiction. That decree was reversed by the Court of Appeals. After the filing of the mandate in the Circuit Court, a final decree was entered in favor of the complainant. Thereupon the case was brought here, the judge certifying that the defendants had challenged the jurisdiction of the court as a Federal court to hear and determine the cause. That appeal was dismissed on the ground that the Circuit Court was bound to follow the decision of the Circuit Court of Appeals—it being said (p. 332) that "if error was committed, it is not for the Circuit Court to pass upon that question. The Circuit Court could not do otherwise than carry out the mandate of the Circuit Court of Appeals and could

not refuse to do so on the ground of want of jurisdiction in itself or in the appellate court."

It is urged that the decision in the *Alton Case* does not apply, because in it there had been a final decree dismissing the bill for want of jurisdiction, while in the present case the ruling of the Circuit Court of Appeals was made on a review of an interlocutory order, from which, it is said, no writ of certiorari could issue. It is argued that the complainant was obliged to wait until a final decree was entered, and then, for the first time, its right of appeal became perfect, under § 5 of the act of 1891 (26 Stat. 827), permitting cases to be brought to this court on questions of jurisdiction.

We need not consider when a writ of certiorari may issue to review decisions on interlocutory orders by the Circuit Court of Appeals, for, in any event, its judgment in the present case must be treated as equivalent to a direction to enter a final decree against the complainant for want of jurisdiction. It is true that the mandate did not in terms make such an order, yet its direction that the Circuit Court "should proceed in accordance with the opinion" operated to make the opinion a part of the mandate as completely as though it had been set out at length. Under such a mandate nothing was left for the Circuit Court to do except to dismiss the bill. It was within the power of the Circuit Court of Appeals to make such an order on an appeal from an interlocutory order. For, while at one time there was some difference in the rulings on that subject, it was finally settled by *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, that on appeal from a mere interlocutory order the Circuit Court of Appeals might direct the bill to be dismissed if it appeared that the complainant was not entitled to maintain its suit. *In re Tampa Suburban R. Co.*, 168 U. S. 583; *Ex parte National Enameling Co.*, 201 U. S. 156, 162; *Bissell Co.* v. *Goshen Co.*, 72 Fed. Rep. 545, 556–560.

It follows, therefore, that the Circuit Court of Appeals had authority to make a ruling which finally disposed of the case; that the complainant then had the right to ask it to certify the question of jurisdiction, and if that was refused, might have applied to this court for a writ of certiorari. Having failed successfully to prosecute these remedies, the judgment of the Circuit Court of Appeals remained conclusive upon the parties and binding upon the Circuit Court and every other court to which the case could by any possibility be taken. For these reasons, the question as to whether there was a suit which was removable cannot be considered and the appeal must be

Dismissed.